Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DENNIS A. REID,

Petitioner,

v.

ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A.,

Respondents.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Texas-based USRT developed a plan to commercialize Russian satellite orbital slots. Alenia, a foreign company, valued that plan at $5 billion and agreed to be USRT's joint venture partner to implement it. Alenia led USRT to believe the project was going forward as planned, but in reality, Alenia was developing its own plan to implement the project without USRT. Then, in concert with others, Alenia did precisely that: usurping the entire business opportunity USRT had created while transforming USRT into a shell of a business with no remaining operations of its own. Separately, but during the same time period, Alenia maintained a constant business presence in Texas at the request of other parties under lucrative service agreements it had entered, including one worth $300 million.

The question presented is whether the Constitution permits Texas to assert personal jurisdiction over Alenia in litigation arising from Alenia's breach of fiduciary duty and participation in a conspiracy to oust USRT from the joint venture. In the present case, this question embraces three issues that have divided lower courts regarding the proper way to assess a defendant's forum contacts when deciding issues of personal jurisdiction:

1. Whether courts may ignore a defendant's imputed or actual participation in a conspiracy to harm a forum business.

2. Whether courts may weigh a defendant's forum contacts in isolation from each other.

3. Whether courts may ignore a defendant's voluntary business activities in a forum because another party initially chose the forum as the site for those activities.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dennis A. Reid respectfully petitions for a writ of certiorari to review the judgment of the Fourteenth Court of Appeals of Texas.

OPINIONS BELOW

The order of the district court denying respondents' special appearance (App. 32-33) is unreported. The opinion of the court of appeals reversing the district court's order (App. 1-30) is reported at 130 S.W.3d 201, and the associated judgment (App. 31) is unreported.

PARTIES TO THE PROCEEDING

The caption includes the names of all parties in the court of appeals. In addition, petitioner derivatively represents two companies: U.S. Russian Telecommunications, LLC and its parent, USRT Holdings, LLC (which has no parent). No publicly-held company owns 10% or more of either company.

JURISDICTION

The court of appeals entered judgment on December 23, 2003. App. 31. Petitioner filed a timely motion for rehearing or en banc consideration, which was denied on April 8, 2004. App. 34-35. Petitioner filed a timely petition for review with the Supreme Court of Texas, which was denied on August 26, 2005. App. 36. Petitioner filed a timely motion for rehearing, which was denied on March 10, 2006. App. 37. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). See *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984) (holding that an interlocutory state court judgment is "final" under § 1257 if, on the relevant federal issue, the judgment is final and not subject to further state court review).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property,

without due process of law * * * ."

STATEMENT

A. Facts Supporting Specific Jurisdiction.

In 1995, Texas scientist Dr. Valery Aksamentov learned from his contacts in the Russian space industry that Russia could not afford to replace several of its geosynchronous satellites that were becoming obsolete. As a result, Russia was at risk of losing valuable international rights to the orbital slots associated with these satellites. Recognizing that this presented an unusual business opportunity, Dr. Aksamentov explained to the Russian government how a partnership with private interests could enable it to keep its orbital slots and obtain new satellites by leasing a portion of the satellites' capacity to commercial interests. SCR 66-68.[1]

Encouraged, Russia enacted legislation allowing this concept to proceed, and Dr. Aksamentov established U.S. Russian Telecommunications, LLC ("USRT") to coordinate the financing, leasing, and operation of new Russian satellites. *Id.* at 67-68. As found by the court of appeals (App. 11-12), USRT's principal place of business was Texas from its inception until August 1999, when its business operations effectively ceased. See *infra* at 5 (explaining ultimate termination of USRT's active managers).

After its formation, USRT sought a financial partner for the satellite project. One of the first entities that expressed interest was the Italian government. To facilitate discussions, the government designated Giorgio Capra, an advisor to its Ministry of Defense, to serve as a project liaison with USRT. Capra was assisted in this role by another Italian, Vincenzo Davide Siniscalchi. CR 5.

Although the government was interested in financing the project, it wanted an Italian company to be involved. Capra

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[1] The district court clerk's record is cited as CR #, and the supplemental clerk's record is cited as SCR #.

introduced USRT to respondent Alenia Spazio, S.p.A., a major player in the worldwide space industry, who also conducted substantial business at the Johnson Space Center in Houston, Texas. CR 5; SCR 450; *infra* Part B. At the time, Alenia Spazio was a division of respondent Finmeccanica, S.p.A., which in turn was owned by the Italian government. SCR 69-70, 175-76, 450. This petition refers to respondents collectively as "Alenia."

In December 1997, USRT presented its confidential business plan to Alenia, who agreed to be USRT's joint-venture partner and promised to obtain government financing for the project. SCR 63, 69-71, 78.

Shortly thereafter, in January 1998, Alenia's representatives traveled to Texas to meet with USRT, negotiate additional terms for the joint venture, outline the parties' rights and responsibilities, and develop a plan of action. Alenia subsequently discussed and negotiated other aspects of the joint venture through calls and correspondence with USRT in Texas. SCR 70-72, 81, 91-92, 95-96, 105, 108-10, 180-83, 307, 367.

Alenia estimated that revenues for the project's initial phase would be $5 billion. Based on the parties' agreements, USRT's share would have been $1.5 billion, which reflected USRT's contribution to the venture in terms of formulating the original concept and putting the deal together, among other things. SCR 68, 70-71.

Things appeared to be going as planned, but in hindsight, Alenia's initial promises were a way to lull USRT into curtailing further search for project financing while Alenia learned the details of USRT's confidential plan and developed a scheme to convert that plan for itself. To that end, Alenia engaged in various delay tactics while maintaining a superficial commitment to the project. First, Alenia engaged USRT in repeated negotiations of subsidiary agreements as a precursor to project financing. SCR 32-37, 39-42, 44-47, 49-

55, 57-61.[2] Then, when financing still was not forthcoming, Alenia loaned USRT $50,000 to cover interim operating expenses as an apparent show of good faith. *Id.* at 19, 74, 108-10. Finally, during that summer, project liaison Capra and his assistant Siniscalchi began suggesting to USRT that the Italian government might be more willing to provide project financing to Alenia if USRT was owned in name by an Italian. By the fall, this suggestion became an ultimatum. *Id.* at 71.

Given a lack of other financing options at this stage and a fear that Russia might give the project to others if USRT did not come through, USRT's owners eventually agreed to transfer the company's shares to a holding company owned by Capra in exchange for a $300 million stake in USRT's future revenues, to be paid from the first revenues earned from the project. SCR 377.

Although USRT's ownership structure had changed, the company retained certain key managers, including Dr. Aksamentov, who became USRT's Chief Operating Officer for Russian Affairs, and Jon Reed, a former manager who became USRT's President. Also at that time, petitioner Dennis A. Reid became USRT's Chief Financial Officer. In addition, both he and USRT's President received a minority interest in the holding company itself. SCR 66, 123, 137.

Despite the change in ownership, USRT still appeared to be positioned to earn substantial fees from the satellite project for its former and current owners. Unfortunately, however, the "required" sale of USRT to obtain project financing

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[2] One of those agreements provided that disputes arising in connection with it would be subject to arbitration in England. SCR 53-54. An enforceable arbitration clause would be a relevant fact in any minimum-contacts analysis, but Alenia did not seek a finding that the clause was enforceable in the trial court and disclaimed that the present dispute was subject to mandatory arbitration by contending that the cited agreements were "precontractual" and not "binding" and that the appropriate forum for this dispute was not in a chosen arbitral forum, but rather in Italy. CR 78, 184, 195.

had been the first step in Alenia's plan to prevent USRT from earning any project fees. Specifically, after distancing most of USRT's former owners and management from further control of the company, Alenia offered USRT's remaining management a $20+ million kickback to transfer USRT's satellite project rights to Alenia. SCR 124-25.

Such a deal would have been personally lucrative for the individual managers, but it was not in USRT's best interests because it would prevent USRT from earning satellite revenues for itself or its former owners, who were owed "best efforts" on the $300 million obligation described above. Consequently, both USRT's President and its CFO refused to participate in Alenia's plan. Given Capra's majority ownership of the new holding company, their resistance ultimately proved futile, and in the fall of 1999, Capra had them fired by Siniscalchi, who had become USRT's Chief Operating Officer. SCR 123-25, 377.

Alenia still owed joint-venture obligations to USRT, but it was now free, at least as a practical matter, to usurp the business opportunity USRT had created because USRT's remaining management (Capra and Siniscalchi) was loyal to Alenia rather than USRT. To that end, Alenia proceeded to commercialize Russian satellites slots without USRT, launching the first satellite in late 1999. Since then, several additional satellites have been or are planned to be launched in accordance with USRT's original plan, to the substantial detriment of USRT and its former and present owners, including petitioner. SCR 125, 276.

B. Facts Supporting General Jurisdiction.

Before the events giving rise to this dispute, Alenia contracted to perform ongoing activities and services at the Johnson Space Center in Texas in connection with Alenia's work on the International Space Station. SCR 196-99. Alenia's primary contract was a $300 million agreement with the Italian Space Agency ("ISA"), which Alenia characterized as one of its "most important" contracts. *Id.* at 258. Under that contract, Alenia agreed to maintain a "continuous and constant

presence" at the Johnson Space Center in Texas. *Id.* at 454. Alenia met this obligation by stationing certain employees in Texas on a permanent basis. *Id.* at 306.

In addition to those permanent Texas employees, Alenia sent numerous other employees to Texas to perform work related to the International Space Station, both under the ISA contract as well as multi-million dollar contracts it had with the European Space Agency and a German company. SCR 197-99. Specifically, between 1998 and 2002, Alenia sent over a hundred employees to Texas for individual stays averaging between one and three weeks each to support Alenia's work on the International Space Station. *Id.* at 298-306, 322-33. Finally, to support Alenia's work in Texas during this time, sixty Alenia employees regularly directed phone, fax, mail, or email communications to individuals at the Johnson Space Center in Texas. *Id.* at 306-18, 335-40, 342-52.

C. Procedural History.

In March 2002, petitioner filed suit on behalf of USRT in Texas district court, raising derivative claims against Alenia, Capra, and Siniscalchi, including claims for civil conspiracy and breach of fiduciary duty. Capra never appeared and Siniscalchi was non-suited because of a bankruptcy. Alenia challenged personal jurisdiction by a special appearance, which the trial court heard and denied. CR 2-14, 15, 66, 180; App. 32-33.

In a divided opinion, the court of appeals reversed. The majority first considered whether Alenia had established minimum contacts with Texas to support the assertion of specific jurisdiction. App. 8-18. On that front, the court held that several of Alenia's Texas contacts did not support jurisdiction because none standing alone was enough to establish minimum contacts:

- Alenia's formation of a joint venture with USRT, a Texas business, did not support jurisdiction because "[c]ontracting with a Texas entity alone does not satisfy the minimum-contacts requirement." App. 13.

- Alenia's project-related communications directed at USRT in Texas did not support jurisdiction because "numerous telephone and facsimile communications with people in Texas relating to an alleged contract do not establish minimum contacts." *Ibid.*
- Alenia's loan of funds to USRT did not support jurisdiction because "sending funds to Texas is not determinative." *Ibid.*

In addition, the court held that Alenia's in-state negotiations of a subsidiary agreement with USRT did not support jurisdiction because it had been superseded by a later agreement. App. 14. As to all of these Texas contacts, the court held that the same analysis applied regardless of which substantive claim was at issue. *Id.* at 14 n.10.

The court then held that Alenia's launch of a satellite without USRT in late 1999 did not support jurisdiction. App. 15-16. The court reasoned that, even if Alenia's pursuit of the satellite project was a breach of fiduciary duty, it had not occurred in Texas, and the associated harm to USRT had not been directed at Texas because the launch occurred after USRT's Texas operations ceased in August 1999. *Ibid.*

The court also held that specific jurisdiction could not be based on Alenia's participation in a conspiracy to oust USRT from the joint venture. On that front, the court acknowledged that Alenia's proposed kickback to USRT's management was arguable evidence of a conspiracy, App. 4, 15-16, but held that such a conspiracy was irrelevant because:

- Alenia's conspiratorial conduct did not occur in Texas (App. 16);
- the conduct of Alenia's co-conspirators could not be imputed to Alenia (*id.* at 15-16), citing *National Industrial Sand Association* v. *Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (orig. proceeding), for the proposition that an "alleged co-conspirator's contacts with Texas cannot be counted as contact[s] of other alleged co-conspirators"; and

- Alenia's *own* participation in a conspiracy to harm a Texas business could not be used to establish specific jurisdiction. App. 16 n.12 (rejecting proposition that "a defendant who participates in a conspiracy known to impact Texas has satisfied the requirements for specific jurisdiction").

The court next considered the question of general jurisdiction. App. 18-25. It acknowledged that a defendant's maintenance of "a permanent general business office through which it solicits business in Texas * * * weigh[s] strongly in favor of general jurisdiction," but held that Alenia did not maintain such an office in Texas because it did not use its office at the Johnson Space Center "to promote or market its goods or services in Texas[] or for any purpose other than supporting the Space Station Project." *Id.* at 21.

The court then considered Alenia's in-state activities under the service agreements it had with foreign entities. App. 22-25. The court recognized that Alenia knew in advance that it would have to perform work ***in*** Texas under those agreements. Yet it held that Alenia's resulting Texas presence did not support general jurisdiction because a third party, rather than Alenia, had initially chosen Texas as the site for Alenia's services. *Ibid.*

Finally, the majority held that asserting personal jurisdiction over Alenia would be unreasonable given traditional notions of fair play and substantial justice. App. 25-29. It concluded that Texas had no significant interest in the dispute because USRT had had no Texas operations since August 1999. *Id.* at 27. The court also found that some witnesses were not in Texas; that litigation in Texas would burden Alenia; that a Texas judgment for the plaintiff might not be effective relief because it might not be honored in Italy; and that asserting jurisdiction would raise foreign-relations concerns given the multinational nature of the satellite project. *Id.* at 28.[3]

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[3] Petitioner submits that the court of appeals' fair play analysis was

Justice Edelman dissented from the court of appeals' judgment but did not file a written opinion. App. 30. The court of appeals denied petitioner's motions for rehearing and en banc consideration. App. 34-35. The Supreme Court of Texas denied petitioner's petition for review and motion for rehearing. App. 36-37.

APPLICABLE LEGAL STANDARD

Under the Due Process Clause, state courts may assert personal jurisdiction over a nonresident defendant if the defendant has established "minimum contacts" with the state

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erroneous, but that issue is not further discussed herein because it does not implicate a conflict of authority among lower courts on the underlying legal standard and, as such, does not provide a substantial basis for this Court's review. Even so, it is important to note that the court of appeals' fair play determination is not a basis to deny review because it does not independently support the court's judgment. This is because the proper resolution of the fairness issue depends as a threshold matter on a correct resolution of the minimum contacts question. For example, a defendant's burden of proving that jurisdiction is unfair is significantly heightened once minimum contacts are found. See *Asahi Metal Indus. Co.* v. *Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987) ("When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."); *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 477 (1985) ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable."). As such, if this Court grants the petition and ultimately holds that the court of appeals erred in failing to find minimum contacts, the fairness issue would need to be re-assessed, either by this Court or the court of appeals on remand. If this petition is granted, petitioner will brief the fairness issue since this Court could address it as fairly included in the question presented: "[W]hether the Constitution permits Texas to assert personal jurisdiction over Alenia * * * ." *Supra* at I.

and "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The federal "minimum contacts" standard is at issue here because the personal jurisdiction of Texas state courts extends to the limits of federal due process. See *Am. Type Culture Collection, Inc.* v. *Coleman*, 83 S.W.3d 801, 806 (Tex. 2002).

Under federal law, a defendant establishes minimum contacts with a forum when it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotations marks omitted). Such "purposeful availment" occurs when a defendant deliberately conducts significant activities in the forum, creates continuing obligations with forum residents, or intentionally targets forum residents through tortious out-of-state activity. See *id.* at 475-76; *Calder* v. *Jones*, 465 U.S. 783, 789-90 (1984).

When conducting minimum contacts analyses, courts often use the concepts of "specific" and "general" jurisdiction. "Specific jurisdiction" denotes jurisdiction for a particular case. Such jurisdiction exists when litigation arises from or relates to the defendant's minimum contacts. *Burger King*, 471 U.S. at 472-73. In contrast, "general jurisdiction" denotes jurisdiction for any case against a particular defendant. General jurisdiction exists if a defendant's forum contacts are continuous and systematic, whether they relate to particular litigation or not. *Id.* at 473 n.15.

REASONS FOR GRANTING THE PETITION

USRT, a Texas business, developed an innovative plan to commercialize Russian satellite orbital slots. Alenia valued that plan at more than $5 billion and agreed to be USRT's joint venture partner to implement the plan and share in those revenues. Alenia's subsequent actions suggested the venture would go forward as planned: Alenia traveled to Texas to negotiate a subsidiary agreement, directed project-related communications to USRT over a period of months as the par-

ties negotiated other subsidiary agreements, and loaned USRT operating funds to keep it going as project financing was continually delayed.

In reality, Alenia's forum and forum-directed actions were the first step in an orchestrated plan to usurp the entire business opportunity USRT had created – a plan that eventually turned USRT into an empty shell with no operations of its own, thereby leaving Alenia "free" to implement the satellite project without it.

Separately, but during the same time period, Alenia conducted continuous and systematic business ***in*** Texas under service agreements it had with foreign parties.

On these facts, the trial court found it could assert personal jurisdiction over Alenia, but a divided panel of the court of appeals reversed, holding that Alenia had not established minimum contacts with Texas to support specific or general jurisdiction.

The majority's holding was a foregone conclusion given its flawed analysis. In terms of specific jurisdiction, the majority examined Alenia's primary Texas contacts in isolation from each other and the litigation as a whole. Then the majority ignored Alenia's imputed and actual participation in a conspiracy to harm its Texas partner, USRT. This led the majority to excuse Alenia's ultimate breach of fiduciary duty because that breach conveniently occurred after the conspiracy had shut USRT down.

On the general jurisdiction issue, the majority ignored Alenia's continuous and systematic Texas contacts that arose under service agreements with other entities because a third party had chosen Texas as the worksite, even though Alenia's Texas presence nonetheless resulted from Alenia's voluntary decision to conduct business in the forum through activities that invoked the benefits and protections of Texas law.

As explained below, the court of appeals' analysis implicate multiple splits of authority concerning the proper way to assess a defendant's forum contacts in resolving questions of

personal jurisdiction. In addition, the court's analysis is facially unsound because it allows a foreign defendant to assume fiduciary obligations to a forum business, purposefully cultivate that relationship through forum and forum-directed activities, breach those obligations through actions that destroy the forum business, and separately conduct other substantial business activities in the forum, all without being called to the forum to account for its tortious conduct.

Because the court of appeals' decision implicates multiple splits of authority on recurring constitutional issues and does so in a way that leads to unsound results, this Court should grant the petition and reverse the court of appeals' judgment.

I. Appellate courts are divided on whether a defendant's imputed or actual participation in a conspiracy to harm a forum business supports specific jurisdiction.

A conspiracy commonly is defined as "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement." BLACK'S LAW DICTIONARY 329 (8th ed. 2004). In Texas, like most jurisdictions, "each co-conspirator [in a civil conspiracy] is responsible for the action of any of the co-conspirators which is in furtherance of the unlawful combination." *Akin* v. *Dahl*, 661 S.W.2d 917, 921 (Tex. 1983); see, *e.g.*, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF Torts § 46, at 322-24 (5th ed. 1984). The imposition of liability for the unlawful acts of co-conspirators is based on the concept that, when an individual joins a conspiracy, he ratifies the prior acts of his co-conspirators and appoints them as agents for their future acts. As explained by Judge Learned Hand:

> "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime.' What one does pursuant to their common purpose, all do * * * ."

Van Riper v. *United States*, 13 F.2d 961, 967 (2d Cir. 1926).

When litigation arises in connection with a conspiracy, that conspiracy provides two potential bases for establishing personal jurisdiction over a defendant conspirator. First, if the acts of the defendant's co-conspirators may be imputed to the defendant, those acts can increase the universe of forum and forum-directed contacts a court must consider in a minimum contacts analysis. See, *e.g.*, *Textor* v. *Bd. of Regents*, 711 F.2d 1387, 1392-93 (7th Cir. 1983) ("The 'conspiracy theory' of personal jurisdiction is based on the 'time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.' ").[4] Second, insofar as a defendant's ***own*** participation in a conspiracy represents intentionally tortious activity, that tortious conduct would support the assertion of personal jurisdiction in the forum where it occurred or where it was directed. See *Calder*, 465 U.S. at 789-90.

These two potential bases for jurisdiction are distinct because the first relies on concepts of agency to impute the actions of one conspirator to another, while the second focuses on the direction of a defendant's own intentionally tortious conduct. To see how these differences could arise in practice, consider a conspiracy between businesses in California and Texas whose object is to improperly obtain trade secrets from a New York business. Under an imputation theory, the acts of the California business in California could be attributed to the Texas business and provide a basis for jurisdiction over it in California. In contrast, under an actual participation theory, the Texas business's own role in the conspiracy could constitute intentionally tortious activity directed at New York and provide a basis for jurisdiction over it in New York. As next explained, lower appellate courts are divided on whether

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[4] *Cf. Burger King*, 471 U.S. at 479 n.22 ("[W]hen commercial activities are carried on in behalf of an out-of-state party those activities may sometimes be ascribed to the party [for personal jurisdiction purposes], at least where he is a primary participan[t] in the enterprise and has acted purposefully in directing those activities." (internal quotation marks and citations omitted)).

either of these bases for establishing personal jurisdiction comports with federal due process.

Imputation.—One circuit and the appellate courts of nine States have held that due process allows the imputation of a conspirator's forum contacts to his co-conspirators. See *Textor*, 711 F.2d at 1392-93; *Mackey* v. *Compass Mktg., Inc.*, 892 A.2d 479, 487-92 (Md.), *petition for cert. filed*, 74 U.S.L.W. 3655 (U.S. May 10, 2006) (No. 05-1433); *Santa Fe Techs., Inc.* v. *Argus Networks, Inc.*, 42 P.3d 1221, 1233-34 (N.M. Ct. App. 2001); *Chenault* v. *Walk[illegible]* 36 S.W.3d 45, 53-54 (Tenn. 2001); *Execu-Tech Bus. Sys., Inc.* v. *New Oji Paper Co.*, 752 So. 2d 582, 583-84, 586 (Fla. 2000); *Cameron* v. *Owens-Corning Fiberglas Corp.*, 695 N.E.2d 572, 577-78 (Ill. App. Ct. 1998); *Rudo* v. *Stubbs*, 472 S.E.2d 515, 517 (Ga. Ct. App. 1996); *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982); *Reeves* v. *Phillips*, 388 N.Y.S.2d 294, 294 (N.Y. App. Div. 1976).

With one exception,[5] each of the above cases imputed the forum contacts of one conspirator to a defendant co-conspirator, asserted personal jurisdiction over the defendant co-conspirator, and held that the assertion of jurisdiction comported with federal due process. See, *e.g.*, *New Oji Paper*, 752 So. 2d at 585-86. There, the Supreme Court of Florida upheld the assertion of personal jurisdiction against a foreign defendant who had conspired with others to fix the wholesale price of thermal fax paper. *Ibid.* Although the plaintiff had not shown that the defendant had sold any paper in Florida at an inflated price, the court nevertheless held that jurisdiction was proper through imputation because the defendant's conspirators had sold such paper in Florida. *Ibid.*

In conflict with the above cases, the Supreme Court of Texas, along with appellate courts in Washington and Cali-

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[5] *Mackey* held that imputation did not violate due process but had no occasion to actually impute contacts to a defendant because the court's jurisdiction had been invoked solely to answer a question of state law certified by a federal district court. 892 A.2d at 481.

fornia, have rejected the imputation theory as inconsistent with federal due process. See *Nat'l Indus. Sand Ass'n* v. *Gibson*, 897 S.W.2d 769 (Tex. 1995) (orig. proceeding); *Hewitt* v. *Hewitt*, 896 P.2d 1312, 1315-16 (Wash. Ct. App. 1995); *Kaiser Aetna* v. *Deal*, 86 Cal. App. 3d 896, 901 (Cal. Ct. App. 1978).

Actual Participation.—Four state appellate courts have held that a defendant's participation in a conspiracy to harm a forum resident constitutes intentionally tortious conduct that can said to be "directed" at the forum:

- *Istituto Bancario Italiano SpA* v. *Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982) ("[A] defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.").
- *Santa Fe Techs., Inc.* v. *Argus Networks, Inc.*, 42 P.3d 1221, 1233-34 (N.M. Ct. App. 2001) (following *Instituto Bancario Italiano*, 449 A.2d at 225).
- *Rudo* v. *Stubbs*, 472 S.E.2d 515, 517 (Ga. App. 1996) ("When the purpose of a conspiracy is to commit an intentional tort against a [forum resident], all of the co-conspirators are purposefully directing their activities toward [the forum] and should reasonably anticipate being haled into court here.").
- *Hunt* v. *Nev. State Bank*, 172 N.W.2d 292, 312 (Minn. 1969) ("[T]o suggest that it is unfair to require [the defendants] to respond to an action in this jurisdiction would seem to say that they may rely on our contract law to uphold the terms of lawful agreements but that they may not be required to defend an action based on injury to our citizens as a result of [the defendants'] unlawful agreement.").

In conflict, the Supreme Court of Texas has broadly held

that due process concerns prevent it from "recogniz[ing] the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy." *Nat'l Indus. Sand*, 897 S.W.2d at 773.

* * *

Both of the above splits are implicated here because the underlying facts (notably, the coerced sale of USRT by Capra and Siniscalchi, Alenia's proposed bribe to USRT's management, the termination of those managers who would not go along by Capra and Siniscalchi, and Alenia's subsequent launch of a satellite without USRT) provide circumstantial evidence that these parties conspired to remove USRT from the joint venture, thereby breaching the fiduciary duties they owed to it.[6] As such, in jurisdictions where a defendant's own participation in a conspiracy may be used to establish personal jurisdiction, Alenia's proposed bribe and subsequent pursuit of the satellite project without USRT would have been treated as tortious, forum-directed conduct that was relevant to the jurisdictional inquiry. Likewise, in jurisdictions where one conspirator's actions may be imputed to his co-conspirators, the actions of Capra and Siniscalchi in terminating USRT's loyal management and inducing the initial sale of USRT through false pretenses would have been imputed to Alenia, thus increasing the number of tortious, forum-directed contacts relevant to the jurisdictional inquiry.

The court of appeals agreed that Alenia's proposed bribe to obtain USRT's project rights provided arguable evidence of a conspiracy to oust USRT from the joint venture. App. 4, 15. Nevertheless, the court ignored this evidence of Alenia's own participation in the conspiracy while USRT still had Texas operations based on its view that a defendant's "participat[ion] in a conspiracy known to impact Texas" does not

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[6] Capra and Siniscalchi owed fiduciary duties to USRT as corporate officers, while Alenia owed such duties to USRT as its joint venture partner. See *Rankin* v. *Naftalis*, 557 S.W.2d 940, 945 (Tex. 1977).

serve as a basis to establish specific jurisdiction.[7] *Id.* at 16 n.12. In addition, the court refused to impute to Alenia any acts of its co-conspirators (Capra and Siniscalchi) because the court believed it was precluded from doing so under *National Industrial Sand*. *Id.* at 15.[8]

These holdings greatly affected the court's minimum contacts analysis. Most notably, they prevented the court from giving any weight to a key fact supporting specific jurisdiction: Alenia's pursuit of the satellite project without USRT. In any other situation, such a breach of a fiduciary duty would provide a basis for jurisdiction all by itself.[9] Here, however, the court viewed that breach as jurisdictionally irrelevant because it occurred ***after*** the conspiracy had shut down USRT.

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[7] The court of appeals noted that it is unknown whether Capra and Siniscalchi ever executed a formal transfer of USRT's project rights to Alenia, App. 17, suggesting that the tortious character of Alenia's conduct might depend on the existence of such a transfer. Such a suggestion is flawed, however, because Alenia's conduct achieved the same result whether it induced Capra and Siniscalchi to execute a formal transfer or merely to refrain from asserting USRT's project rights as Alenia pursued the project without it.

[8] In its imputation analysis, the court of appeals discussed only one potential Texas contact involving Alenia's co-conspirators (a phone call from Siniscalchi). App. 15. The court's reliance on *National Industrial Sand*, however, makes clear that it also believed it was precluded from imputing to Alenia any Texas-directed contacts of Siniscalchi or Capra, which would include their coerced sale of USRT and termination of USRT's loyal management.

[9] See, *e.g.*, *Burger King*, 471 U.S. at 473 ("[P]arties who reach out beyond one state and create continuing relationships . . . with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities." (internal quotation marks omitted)); *ibid.* ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (internal quotation marks omitted)).

App. 17. But it defies common sense that Alenia can participate in a conspiracy to usurp the business opportunity developed by its Texas partner, yet incur no jurisdictional consequences so long as that overall scheme is not completed until its partner has been effectively silenced by the same conspiracy. If the court of appeals been able to given any weight to Alenia's actual and imputed participation in the conspiracy to oust USRT from the joint venture, such an unsound result would not have occurred.

Because the court of appeals' decision implicates two related but distinct due process issues that have divided appellate courts, this Court should grant this petition. Because parties like Alenia should not be able to disclaim the consequences of the conspiracies they participate in or the actions of their co-conspirators in furtherance of them, this Court should reverse the court of appeals' judgment.

II. Appellate courts are divided on whether a defendant's forum contacts may be weighed in isolation when assessing personal jurisdiction.

Appellate courts are divided on how to assess a defendant's forum and forum-directed contacts that relate to particular litigation. One method is to consider all such contacts collectively. At least four circuits follow this approach:

- *Mid-America Tablewares, Inc.* v. *Mogi Trading Co.*, 100 F.3d 1353, 1360-62 (7th Cir. 1996).

In *Mogi Trading*, a Japanese defendant traveled to Wisconsin for "preliminary discussions" with a potential customer, then sent follow-up faxes and product samples to it. *Id.* at 1361. In litigation concerning the parties' agreement, the Seventh Circuit found that these facts established minimum contacts because "[v]iewed collectively" they established that the defendant's "conduct * * * reflected a purposeful effort to obtain [the plaintiff's] business." *Ibid.* The court stressed that the defendant's trip to the forum "must be considered in conjunction with [the defendant's] other efforts toward obtaining [the plaintiff's] business." *Ibid.*

- *Northrup King Co.* v. *Compania Productora Semillas Algodoneras Selectas, S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995).

In *Northrup King*, a Spanish defendant attended meetings in Minnesota with the plaintiff and directed written communications to it regarding the sale of certain seeds. *Id.* at 1385-86. In litigation concerning those sales, the Eighth Circuit rejected the defendant's "attempt[] to treat each category of [its] numerous and significant communications separately":

> "[A]lthough [the defendant] correctly notes that letters and faxes alone do not establish personal jurisdiction, in conjunction with other contacts they may support the exercise of personal jurisdiction. In determining whether there is personal jurisdiction, the courts consider the defendant's contacts with the forum in the aggregate, not individually; they look at the totality of the circumstances. * * * Although [the defendant] contends that the meetings in [the forum] and some of the letters had nothing to do with the subject matter of this litigation * * * they were an essential part of the course of dealing between the two companies that resulted in the [relevant] sales * * * . [T]hey show that [the defendant] purposefully availed itself of the privilege of conducting activities within [the forum] * * * by seeking out [the plaintiff] in [the forum], endeavoring to foster a continuation of the business relationship that [the defendant] enjoyed with the previous owner of [the plaintiff's line of business], including the purchase of [the product], and carrying out the transaction."

Id. at 1388-89 (internal quotation marks and citations omitted).

- *Yahoo! Inc.* v. *La Ligue Contre Le Racisme*, 433 F.3d 1199, 1207-11 (9th Cir. 2006) (per curiam) (en banc), *cert. denied*, 74 U.S.L.W. 3599 (U.S. May 30, 2006) (No. 05-1302).

In *Yahoo!*, the California plaintiff received a cease-and-desist letter from a French defendant and was served in California with documents from a French lawsuit brought by that defendant. 433 F.3d at 1201-02. The defendant also had obtained interim orders from the French court purporting to enjoin aspects of the plaintiff's business in California. *Id.* at 1202-04. The plaintiff filed suit, seeking a declaration that the foreign orders were unenforceable. *Id.* at 1204. A majority of the en banc Ninth Circuit held that California could assert jurisdiction over the French defendant based on the court orders when "considered in conjunction" with the cease-and-desist letter and service documents. *Id.* at 1208. The court expressly held that neither the letter nor the service documents would have supported personal jurisdiction themselves. *Ibid.*

- *Polythane Sys., Inc.* v. *Marina Ventures Int'l, Ltd.*, 993 F.2d 1201, 1205-06 (5th Cir. 1993).

In *Polythane Systems*, the defendants were Maryland businesses who built marinas in Maryland using foam bought from the plaintiff, a Texas business. *Id.* at 1204. The litigation concerned the alleged defectiveness of the foam after the marinas collapsed in Maryland. *Ibid.* The plaintiff made the foam in Texas, transferred title to the foam in Texas when selling it to the defendants, and received payments from them in Texas. *Id.* at 1204-05. The defendants also had engaged a Texas business to apply the foam in Maryland. *Ibid.* The Fifth Circuit held that Texas had personal jurisdiction over the defendants because "[a]ggregating the [defendants'] contacts with Texas, it is clear that their connections were deliberate, rather than fortuitous, so that the possible need to invoke the benefits and protections of the forum's laws was reasonably foreseeable." *Id.* at 1206 (internal quotation marks omitted)).

In contrast to this collective approach, several Texas appellate courts routinely consider a defendant's contacts in isolation from each other when assessing specific jurisdiction:

- *Magnolia Gas Co.* v. *Knight Equip. & Mfg. Corp.*,

994 S.W.2d 684, 691-92 (Tex. App.—San Antonio 1998, no pet.), *disapproved on other grounds by BMC Software Belgium, N.V.* v. *Marchand*, 83 S.W.3d 789, 794 n.1 (Tex. 2002).

In *Magnolia Gas*, the court concluded that out-of-state defendants who contracted with a Texas resident, sent payments to a Texas resident, and partially performed a contract in Texas "did not purposefully avail themselves of the benefits and protections of Texas law" because "[m]erely contracting with a Texas corporation does not satisfy the minimum contacts requirement," "payments sent to the forum state are not determinative," "minimum contacts may not be satisfied by merely engaging in communications with a Texas corporation during performance of the contract," and "partial performance of a contract in Texas is not the *sine qua non* of personal jurisdiction." 994 S.W.2d at 691-92.

- *TeleVentures, Inc.* v. *Int'l Game Tech.*, 12 S.W.3d 900, 908-12 (Tex. App.—Austin 2000, pet. denied).

This case concerned an agreement between a Texas plaintiff and an out-of-state defendant that was to be partially performed in Texas; in addition, the plaintiff had prepared a business summary at the defendant's request "to serve as a marketing tool and to solicit and attract interest from third-party investors." *Id.* at 904-05, 909. The court held that the defendant had not established minimum contacts because "merely contracting with a Texas corporation does not satisfy the minimum-contacts requirement," "partial performance of a contract in Texas is not the *sine qua non* of personal jurisdiction," and the defendant's "request [for the business summary] does not establish jurisdiction." *Id.* at 908-09 (internal quotation marks omitted).

The plaintiff also had argued that numerous phone, mail, and facsimile contacts between it and the defendant established minimum contacts. *Id.* at 910. The defendant "admit[ted] that decisions regarding the [parties'] project were made while in communication with" the Texas plaintiff, *ibid.*, but the court found these contacts insufficient to

establish jurisdiction. *See ibid.* ("Minimum contacts may not be satisfied by merely engaging in communications with a Texas corporation during performance of a contract.").

- *Shell Compañia Argentina de Petroleo, S.A.* v. *Reef Exploration, Inc.*, 84 S.W.3d 830, 838-40 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

In *Reef Exploration*, the plaintiff asserted that Texas had personal jurisdiction over a foreign defendant in litigation concerning the defendant's purchase of stock previously owned by the plaintiff. *Id.* at 834-35. The defendant had been a party to an agreement with Texas connections and had conducted related due diligence activities that had Texas connections, as well, but the court held that minimum contacts had not been established. *Id.* at 838-39. In so holding, the court considered the contacts arising from the agreement separately from those arising from the due diligence, *ibid.*, and then considered the due-diligence contacts separately from each other. *See id.* at 839 ("[P]ayments sent to the forum state are not determinative."); *ibid.* ("[E]ngaging in negotiations with a party's attorney is not enough to establish minimum contacts.").

* * *

The court of appeals did not deny that Alenia had invoked the benefits and protections of forum law through several forum and forum-directed activities, including: (1) forming a joint venture with a Texas business, (2) directing project-related communications to a Texas business, (3) loaning funds to a Texas business, and (4) conducting business negotiations in Texas on an agreement related to the litigation. Nevertheless, as in the above Texas cases, the court of appeals weighed these contacts separately from each other and the rest of the litigation. As to (1), (2), and (3), the court held that none supported jurisdiction because none was sufficient, standing alone, to establish minimum contacts:

- "Contracting with a Texas entity alone does not satisfy the minimum-contacts requirement." App. 13.

- "[N]umerous telephone and facsimile communications with people in Texas relating to an alleged contract do not establish minimum contacts." *Ibid.*
- "[S]ending funds to Texas is not determinative." *Ibid.*

The court then concluded that Alenia's in-state negotiation of an agreement related to the joint venture was irrelevant because it was later superseded by another agreement between the parties. App. 14. If the prior agreement may be considered in a vacuum, such an analysis might make sense. Viewed in context, however, Alenia's in-state negotiations further demonstrated its purposeful efforts to cultivate a fiduciary relationship with an entity it later betrayed. Moreover, those efforts in particular "enhance[d]" and "reinforced" Alenia's affiliation with Texas given that they occurred ***in*** the forum. *Burger King*, 471 U.S. at 476, 482.

By viewing Alenia's Texas contacts in isolation from each other and the rest of the litigation, the court of appeals contravened the underlying due process standard. The relevant question is not whether one of a defendant's forum or forum-directed contacts establishes "minimum contacts" by itself. The question is whether a defendant should reasonably anticipate being called to the forum to defend itself in litigation related to its forum and forum-directed conduct. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). As recognized by the Fifth, Seventh, Eighth, and Ninth Circuits, that kind of determination requires a collective examination of a defendant's contacts because the existence of multiple, related contacts increases and reinforces the foreseeability of litigation.

Here, by isolating Alenia's forum contacts from each other and the litigation as a whole, the court of appeals cut down each tree while ignoring the forest: that Alenia repeatedly invoked the benefits and protections of forum law to develop a close relationship with a Texas business that it later betrayed. Viewed in that context, Alenia's contacts provide a compelling basis for jurisdiction. See *Burger King*, 471 U.S. at 475-76 ("[W]here the defendant * * * has created 'continu-

ing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (citations omitted)).

Because the court of appeals' decision conflicts with the underlying due process standard, implicates the minority view of a longstanding split of authority, and leads to the unsound result that a foreign defendant need not defend itself in litigation related to its purposeful attempts to cultivate a joint-venture relationship with a partner it later betrays, this petition should be granted and the judgment below reversed.

III. Appellate courts are divided on whether a defendant's voluntary business activities in a forum may be ignored if a third party initially chose the forum.

A defendant establishes minimum contacts to support general jurisdiction if its contacts with a forum are "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall,* 466 U.S. 408, 414-16 & n.9 (1984). Alenia met this standard because it contractually agreed to maintain a "continuous and constant presence" in Texas under a contract worth $300 million dollars and then fulfilled that obligation by stationing full-time employees in Texas. In addition, Alenia supported its "continuous and constant" Texas presence through hundreds of trips to Texas and out-of-state communications directed at Texas. By maintaining and supporting this in-state presence, Alenia purposefully availed itself of the privilege of conducting business in Texas on a continuous and systematic basis.

The court of appeals did not deny that Alenia's contacts were continuous and systematic but held they should be ignored because a third party, rather than Alenia, had chosen Texas as the site for the services Alenia had agreed to per-

form under its service contracts.[10] App. 22. The court reasoned that, although Alenia knew in advance that its contractual performance required work in Texas, *ibid.*, the third party's choice of Texas somehow transformed Alenia's subsequent in-state conduct into "unilateral third-party activity" that cannot be considered in a minimum contacts analysis. See *Burger King*, 471 U.S. at 474 ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." (internal quotation marks omitted)).

The court of appeals' holding profoundly distorts an otherwise sound principle. Properly understood, the unilateral activity principle just means that a third party's forum contacts cannot be attributed to the defendant if there is only a unilateral relationship between the third party and the defendant. For example, if a California resident travels to Texas and, out of the blue, calls a Michigan resident, the call would be a Texas contact for the California resident, but it would not be a Texas contact for the Michigan resident because it resulted from the unilateral actions of the California resident.

In contrast, assume the California resident offered to pay the Michigan resident to do work in Texas and the Michigan resident voluntarily agreed to do so. The California resident's choice of Texas as the worksite could still be classified as "unilateral third-party activity," but the Michigan resident's subsequent work in Texas would not. It would not be third-party activity because it would be the first-party actions of the Michigan resident himself. It would not be unilateral because it would have resulted from the Michigan resident's

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[10] The court also found that Alenia did not solicit business from Texas residents through a Texas office. App. 21. That holding does not independently support the court of appeals' judgment, however, because a defendant may invoke the benefits and protections of a forum's law on a continuous and systematic basis by doing substantial business in the forum, regardless of whether it solicits business from forum residents. See *Burger King*, 471 U.S. at 475-76.

voluntary decision to create a bilateral agreement by accepting an offer of work from another.

To be sure, this suggests that a foreign defendant must accept certain jurisdictional consequences when it voluntarily assumes obligations that require it to work in a forum chosen by another. But that makes sense: by voluntarily working ***in*** the forum, the defendant necessarily invokes the benefits and protections of the forum's law – regardless of who initially chose the forum – so long as the defendant's presence in the forum is ultimately a result of its own voluntary decision to enter such an agreement. Any other view would let a foreign defendant establish a continuous and systematic business presence in a forum for its own financial gain and accept the benefits and protections of forum law, yet avoid any jurisdictional consequences for its activities by claiming that a voluntarily-entered contract was the "unilateral" reason for its being there.

Such an unsound interpretation of the unilateral activity principle has been correctly rejected by five circuits:

- *Mesalic* v. *Fiberfloat Corp.*, 897 F.2d 696, 700-01 (3d Cir. 1990).

In *Mesalic*, the plaintiff sued an out-of-state manufacturer for breach of contract involving the purchase of a boat. *Id.* at 697-98. The Third Circuit held that the defendant's visit to the forum was not unilateral activity even though it had been requested by the plaintiff:

> "We conclude that the fact that [the defendant] delivered the boat to [the forum] and repaired the vessel in [the forum] as an accommodation to [the plaintiff] does not preclude such contacts from being sufficient minimum contacts to establish personal jurisdiction. * * * While the contract between the parties may not have obligated [the defendant] to deliver and repair the boat in [the forum], nonetheless they did. * * * This conduct – accommodating the buyer – is not surprising in view of today's commercial realities."

Id. at 700.

- *Myers* v. *John Deere Ltd.*, 683 F.2d 270, 272 (8th Cir. 1982).

In *Myers*, a Canadian defendant loaded a wooden pallet onto a train bound for Iowa. *Id.* at 271. In North Dakota, the pallet collapsed and injured a customs inspector, who sued the defendant. *Ibid.* In upholding jurisdiction over the defendant in North Dakota, the Eight Circuit rejected the defendant's argument that the presence of the pallet in North Dakota had been the "unilateral activity" of another, for even if the defendant did not control the train's route, it knew the train was going through North Dakota and could have made other shipping arrangements if it did not want its pallet to travel through that forum. *Id.* at 272.

- *Trinity Indus., Inc.* v. *Myers & Assocs., Ltd.*, 41 F.3d 229, 231 (5th Cir. 1995).

In *Trinity Industries*, the Fifth Circuit held that Texas could assert jurisdiction over an out-of-state law firm in an action by a Texas client. *Id.* at 230. Although the Texas client unilaterally solicited the services of the law firm (and thus unilaterally determined that the law firm's obligations would attach in Texas rather than elsewhere), the Fifth Circuit held that this did not prevent the law firm's representation of the client from being a relevant Texas contact:

> "That [the plaintiff] initially solicited the services of the [defendant] firm does not change this result. Although personal jurisdiction does not lie when the defendant cannot control vulnerability to suit, the defendants at bar voluntarily assumed and continued the obligation of representing the Texas client."

Id. at 231.

- *Bank Brussels Lambert* v. *Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 128-29 (2d Cir. 2002).

As in *Trinity Industries*, the defendant in *Bank Brussels Lambert* was an out-of-state law firm that agreed to represent

a forum resident. 305 F.3d at 123. In finding personal jurisdiction over the defendant, the Second Circuit rejected the argument that the defendant's New York representation was "unilateral activity" because, among other reasons, it was a relationship "the firm voluntarily undertook." *Id.* at 128-29.

- *Madison Consulting Group* v. *South Carolina*, 752 F.2d 1193, 1204 (7th Cir. 1985).

In *Madison Consulting Group*, the plaintiff agreed to perform consulting services for the defendants and then performed them in Wisconsin. *Id.* at 1195. The court treated the plaintiff's performance as a relevant Wisconsin contact of the defendants because that location had been "contemplated by the defendants at the time of contracting." *Id.* at 1204. In so holding, the court rejected the argument that the plaintiff's actions should be considered unilateral activity. See *id.* at 1206 (Swygert, J., concurring in judgment).

In conflict with the above cases is the court of appeals' view that the unilateral activity principle reaches all acts performed in the forum at the behest of a third party, even those performed by the defendant himself. As explained above, this view represents an unsound distortion of the underlying due process principle. Moreover, this erroneous view is entrenched in Texas jurisprudence. See *Am. Type Culture Collection, Inc.* v. *Coleman*, 83 S.W.3d 801, 809 (Tex. 2002) ("[The defendant's] attendance at * * * five Texas conferences does not support the exercise of general jurisdiction. The record reflects that the scientific community, not [the defendant], selected the conference locations."); *Reyes* v. *Marine Drilling Cos.*, 944 S.W.2d 401, 404-05 (Tex. App.—Houston [14th Dist.] 1997, no writ) (finding no minimum contacts where the defendant "sent representatives to companies in Texas when visits were necessitated by [third-party] contractual obligations to the federal government"); *Conner* v. *ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 417-18 (Tex. App.—Houston [14th Dist.] 1997, no writ) (plurality op.) (ignoring fact that defendant operated barges that traveled to Texas because "barge loads only go to Texas upon

customer request"). In addition, the Florida court of appeals has similarly misconstrued the unilateral activity principle in a case nearly identical to *Conner*. See *Am. Overseas Marine Corp.* v. *Patterson*, 632 So. 2d 1124, 1126-30 (Fla. Dist. Ct. App. 1994).[11]

Because the court of appeals ignored Alenia's continuous and systematic activities in Texas on an unsound basis that implicates a longstanding split of authority on the scope of an important due process principle, this Court should grant this petition and reverse the court of appeals' judgment.

IV. This case presents a good vehicle for resolving these conflicts of authority.

Since *International Shoe*, personal jurisdiction has become one of the most litigated issues in state and federal courts. *See* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 (1995). One explanation for this litigation boom is that the standards for assessing minimum contacts are neither clear nor easy to apply. This case presents a good vehicle to help clarify some of those standards because the court of appeals' judgment implicates the minority view on multiple, longstanding conflicts of authority. In addition, the fact that both the trial court and one member of the appellate panel determined that Texas could assert jurisdiction over Alenia suggests that a resolution of any one of these issues in petitioner's favor is likely to be outcome determinative.

Petitioner notes that another pending petition raises the imputation issue, see *Mackey* v. *Compass Mktg., Inc.*, No. 05-1433, which further demonstrates the recurring importance of that particular question. The present case presents a better vehicle for this Court, however, because it implicates addi-

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[11] The relevant customer in *Patterson* was the U.S. military rather than a private party, but that does not change the analysis because in both *Patterson* and *Conner*, the defendant boat operators apparently had agreed to take their boats wherever customers requested.

tional due process issues that have divided lower courts. In addition, because *Mackey* arises from a federal district court's certification of a state law issue to a state supreme court, there may be a threshold question as to whether the relevant federal issue there is final for purposes of 28 U.S.C. § 1257.

The present case also is a good example of the way in which Texas jurisprudence has made it increasingly difficult for Texas businesses and individuals to obtain relief when harmed by out-of-state defendants. The isolated examination of a defendant's forum contacts causes Texas courts to incorrectly discount forum activities that collectively evidence purposeful availment. At the same time, perceived due process restrictions prevent Texas courts from giving any weight to a defendant's imputed or actual participation in a conspiracy to harm a forum resident. As can be seen, these methods of analysis make it a simple matter to hold that the assertion of personal jurisdiction is unconstitutional in cases involving even the most deceptive forum-directed conduct.

Finally, this case reflects an internally inconsistent approach to federal due process. Although Texas courts will not impute the contacts of one conspirator to his co-conspirator because of due process concerns, those same courts allow foreign defendants to impute their own forum contacts to a third party who asked them to come to the forum, thereby allowing defendants like Alenia to work in the forum and invoke the benefits and protections of forum law in order to earn hundreds of millions of dollars on important contracts, all while avoiding any jurisdictional repercussions.

For these reasons, this case presents a good vehicle for resolving multiple splits of authority on recurring federal due process issues of substantial importance to litigants in both state and federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2006

In The

Fourteenth Court of Appeals

NO. 14-03-00366-CV

ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A., Appellants

V.

DENNIS A. REID, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 02-12305

MAJORITY OPINION

Appellants Alenia Spazio, S.p.A. and Finmeccanica, S.p.A. (collectively, the "Italian Companies") bring this interlocutory appeal from the trial court's order denying their special appearances in a lawsuit filed by appellee Dennis A. Reid ("Reid"). We reverse the trial court's order and remand with instructions to dismiss the claims against the Italian Companies for lack of personal jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

Reid, a Canadian citizen, brought the underlying suit asserting a host of derivative claims against several defendants, including the Italian Companies — two foreign-resident corporations organized under the laws of Italy and having their headquarters and principal places of business in Rome, Italy. The claims involve an alleged business venture for the commercialization of Russian satellites and orbital slots.

The dispute arose from Russia's need to replace several obsolete satellites to avoid losing certain of its geosynchronous orbital slots. The Russian Satellite Communications Company ("RSCC") was responsible for allocating and licensing Russian satellite communication frequencies. Dr. Valery Aksamentov, a Russian space scientist who lived and worked in Houston, Texas, learned from a relative who worked for RSCC that Russia might lose certain orbital slots because it could not afford to replace several obsolete satellites. After learning about this situation, Aksamentov developed a plan to commercialize these orbital slots and then, with funding from outside Russia, build, launch, and operate new satellites to maintain them. This plan was called the Gorizont Satellite Replacement Program ("Plan"). Aksamentov worked with RSCC to obtain approvals from the Russian government to commercialize these orbital slots. In 1997, Aksamentov and others formed U.S. Russian Telecommunications, L.L.C. ("USRT"), a Delaware limited-liability company, to further develop the Plan, which included the launching and building of satellites to fill the orbital slots.

According to Reid's pleading, in 1997, USRT and the Italian government began discussing funding for the Plan. Admiral Giorgio Capra of the Italian Navy was present during these discussions. Capra soon brought the Alenia Spazio division of Finmeccanica, S.p.A.[1] into the discussions. Communications concerning a potential business relationship between Alenia and USRT ensued. Phone calls were made

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[1] We refer to the two corporate appellants in this action as the "Italian Companies." We note, however, that during the time period giving rise to Reid's claims, Alenia Spazio, S.p.A., which we refer to as "Alenia," was a division of Finmeccanica, S.p.A. Finmeccanica's ownership structure changed in 1999, and again in 2000, but its owners have been, in varying degrees, the Italian Treasury Ministry, IRI (a company wholly owned by the Italian Treasury Ministry), and partial public ownership by listing of shares on the Milan stock exchange. Alenia became Alenia Spazio, S.p.A. on April 1, 2000, and is wholly owned by Finmeccanica.

and faxes were sent between Alenia in Italy and Aksamentov at his home in Houston. Reid alleges that in December of 1997, an oral joint venture was created between USRT and Alenia at a meeting in Rome. In January of 1998, representatives of USRT and Alenia met in Moscow. That same month, two Alenia representatives spent one day in Houston negotiating a Memorandum of Agreement ("MOA"). A representative of Alenia signed this MOA ("January 27, 1998 MOA") in Italy.

RSCC transferred its control of the orbital slots to Inspace, another Russian company, in the spring of 1998. In April of the same year, USRT, Alenia, and Inspace signed an MOA, the first signed by these three parties, in which they outlined various concepts that might be used to develop and implement the Plan; however, this MOA stated that "[e]xcept as to the confidentiality provisions of Section 6 which is meant to be binding, this Memorandum is expressly acknowledged to be an aid to further discussions between the Parties and neither creates nor implies the existence of any contractual rights or obligations among the Parties as to the subjects addressed herein."

Shortly thereafter, Alenia and USRT signed another MOA ("May 12, 1998 MOA") which expressly superseded the January 27, 1998 MOA. The May 12, 1998 MOA contained a provision choosing the laws of the United Kingdom and providing that London would be the place for arbitration of any disputes between the parties. The May 12, 1998 MOA stated that, upon the execution of a legally enforceable contract and upon acquiring sufficient financing, Alenia would purchase fifty percent of the equity of USRT. However, any obligations that might have existed under the May 12, 1998 MOA were expressly conditioned on the acquisition of credit facilities for $450 million and $100 million. Reid alleges in his petition that this funding was never obtained, and the Italian Companies agree that this is correct.

On May 15, 1998, Alenia, USRT, and Inspace signed an MOA ("May 15, 1998 MOA") that superseded the April

1998 MOA. This MOA stated that "[e]xcept as to [certain confidentiality and exclusivity provisions] which are meant to be binding [sic] this MOA is expressly acknowledged to be an aid to further discussions among the Parties in order to reach binding, final agreements on the subject matter hereof and neither creates nor implies the existence of any contractual rights or obligations among the Parties as to the subjects addressed herein." In May of 1998, Aksamentov faxed a letter to Alenia requesting a $100,000 advance of a $500,000 loan to cover USRT operating costs. Alenia subsequently wired $50,000 to a bank in Pennsylvania to be forwarded to a USRT account. Alenia's wiring instructions indicated that USRT had a Roswell, Georgia address, but USRT produced a USRT account that reflects a $50,000 credit, and shows a Houston, Texas address.

According to Aksamentov, the "Italians" recommended that USRT should be wholly owned by an Italian citizen to increase the chances of funding from the Italian government. Reid alleges that USRT was sold in October of 1998 to USRT Holdings, L.L.C., a Delaware company owned by Capra (then retired from the Italian Navy). According to Reid, USRT was purchased for $300 million, to be paid from future revenues earned by USRT in the alleged joint venture. Aksamentov was chairman of the board and chief executive officer of USRT before its sale; after the sale, he remained chairman of the board but was chief operating officer for Russian Affairs rather than chief executive officer. Reid alleges that Capra became the chief executive officer after the sale. Later, in March of 1999, Aksamentov resigned from all of his positions with USRT. Reid was appointed chief financial officer of USRT after its acquisition, and Jon Reed was made its president. Capra gave a five percent ownership interest in USRT Holdings to each. Reid later acquired Reed's five-percent interest.

Reid claims that in May of 1999, Davide Siniscalchi, USRT's chief operating officer, told him about a meeting that had taken place in Rome on May 19, 1999, between Capra and Giuseppe Viriglio of Alenia, during which the two men

allegedly discussed a proposal in which USRT would transfer its rights in the alleged joint venture to Alenia in exchange for Alenia "issuing" a lump sum payment of between $20 million and $30 million as well as unspecified future compensation to Capra, Siniscalchi, Reed, and Reid. Reid contends this arrangement would have allowed USRT to avoid financial obligations to its former members by ensuring that USRT did not earn any income from the alleged joint venture. Reid asserts that he and Reed both refused to participate in this proposal and were fired in August of 1999. Reid alleges Alenia later terminated the May 12, 1998 MOA and the alleged joint-venture agreement on grounds that implementation of the Plan was too remote and unlikely.[2] The record shows that, on December 20, 1999, Alenia sent a letter to Siniscalchi stating that the May 12, 1998 MOA was no longer in effect and indicating that there was no relationship between USRT and Alenia regarding the Plan. Reid alleges the first replacement satellite was launched in late 1999, with financing from Alenia, but without USRT involvement. Reid also contends additional satellites have since been launched and are being developed.

Reid filed derivative claims on behalf of USRT and USRT Holdings, L.L.C. against the Italian Companies, Siniscalchi, and Capra. These claims relate to the alleged joint-venture agreement.[3] The Italian Companies filed special appearances contesting personal jurisdiction. After a hearing at

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[2] Under its own terms, the May 15, 1998 MOA expired on July 14, 1998, because the parties had not entered into any binding final agreement for implementation of the first phase of the Plan.

[3] Reid asserts the following claims against the Italian Companies: (1) breach of an alleged joint-venture agreement on behalf of USRT; (2) breach of an alleged fiduciary duty arising out of the alleged joint-venture agreement with USRT; (4) **[*sic*, (3)]** conversion of USRT assets, including the right to participate in and receive profits from the Plan; and (5) **[*sic*, (4)]** tortious interference with an alleged contract between USRT and Inspace.

which no additional evidence was presented, the trial court denied the special appearances. By this interlocutory appeal, the Italian Companies now challenge the trial court's decision.

II. Standard of Review

Whether the Italian Companies are subject to personal jurisdiction in Texas is a question of law subject to de-novo review. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The trial court did not issue any findings of fact or conclusions of law. Therefore, all facts necessary to support the trial court's ruling and supported by the evidence are implied in favor of the trial court's decision. *Id.* at 795. Parties may challenge the legal and factual sufficiency of these implied factual findings. *Id.* In conducting a no-evidence analysis, we review the evidence in a light that tends to support the disputed findings and disregard all evidence and inferences to the contrary. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001). If more than a scintilla of evidence exists, it is legally sufficient. *Id.* More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about a vital fact's existence. *Id.* at 782–83.

When reviewing a challenge to the factual sufficiency of the evidence, we examine the entire record, considering both the evidence in favor of, and contrary to, the challenged finding. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). After considering and weighing all the evidence, we set aside the fact finding only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *GTE Mobilnet of S. Tex. v. Pascouet*, 61 S.W.3d 599, 615–16 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). We may not substitute our own judgment for that of the trier of fact, even if we would reach a different answer on the evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex.

1998). The amount of evidence necessary to affirm a judgment is far less than that necessary to reverse a judgment.[4] *Pascouet*, 61 S.W.3d at 616.

III. Analysis and Discussion

In their two issues, the Italian Companies challenge the trial court's implied findings of specific and general jurisdiction. The Texas long-arm statute governs Texas courts' exercise of jurisdiction over nonresident defendants. Tex. Civ. Prac. & Rem. Code §§ 17.041– .045; *Guardian Royal Exch. Assur. Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991). It allows courts to exercise personal jurisdiction "as far as the federal constitutional requirements of due process will permit." *BMC Software*, 83 S.W.3d at 795. Thus, we rely on precedent from the United States Supreme Court and from other federal courts, as well as Texas decisions, in determining whether a nonresident defendant has shown the exercise of personal jurisdiction violates federal due process guarantees. *Id.*

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[4] Reid claims the Italian Companies have waived any legal or factual sufficiency challenges to the trial court's implied findings of fact because their briefing contains no issues or argument explicitly asserting that these findings are not supported by legally or factually sufficient evidence. Although the Italian Companies have not explicitly challenged the trial court's implied findings of fact, their briefing does assert that USRT's principal place of business was not in Texas, and they cite evidence in the record in support of this argument. The Italian Companies also argue that they have not been involved in any transaction in Texas and that the record does not show that the Italian Companies have sufficient contacts with Texas to satisfy specific or general jurisdiction. We conclude that a challenge to the trial court's implied findings in favor of jurisdiction is a subsidiary question fairly included in the Italian Companies' issues and that the Italian Companies have sufficiently briefed this challenge. *See* Tex. R. Civ. P. 38.1 (e), (h), 38.9; *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 843–44 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Personal jurisdiction over a nonresident defendant is constitutional when two conditions are met: (1) the defendant has established "minimum contacts" with the forum state, and (2) the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *BMC Software,* 83 S.W.3d at 795. A nonresident defendant that has "purposefully availed" itself of the privileges and benefits of conducting business in Texas has sufficient contacts to allow Texas courts to exercise personal jurisdiction over the nonresident. *Id.* Although not determinative, foreseeability is an important consideration in deciding whether the nonresident defendant has purposefully established "minimum contacts" with Texas. *Id.* The concept of "foreseeability" is implicit in the requirement that there be a "substantial connection" between the Italian Companies and Texas arising from the Italian Companies' conduct purposefully directed toward Texas. *See Guardian Royal Exch. Assur., Ltd.*, 815 S.W.2d at 227. A defendant should not be subject to a Texas court's jurisdiction based upon random, fortuitous, or attenuated contacts. *BMC Software Belgium, N.V.*, 83 S.W.3d at 795.

A. Did the trial court properly conclude that it could exercise personal jurisdiction over the Italian Companies based on specific jurisdiction?

In conducting a specific-jurisdiction analysis, we must focus on the relationship among the Italian Companies, Texas, and the litigation.[5] *See Guardian Royal Exch. Assur., Ltd.*, 815 S.W.2d at 228. Specific jurisdiction exists when the plaintiff's claims arise from or relate to the defendant's purposeful contacts with Texas. *American Type Culture Collec-*

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[5] The Italian Companies assert that Reid did not allege any act by the Italian Companies in Texas and that, therefore, they only had to prove that they are nonresidents of Texas to be entitled to dismissal. *See Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). After reviewing Reid's original and supplemental petitions, we conclude Reid satisfied this pleading requirement.

tion, Inc. v. Coleman, 83 S.W.3d 801, 806 (Tex. 2002). Reid argues the Italian Companies are subject to specific jurisdiction in Texas for the following reasons: (1) Reid's breach-of-contract claim arises from or relates to the Italian Companies' purposeful contacts with Texas; (2) the evidence shows that the Italian Companies' alleged tortious conduct occurred, in part, in Texas; and (3) the Italian Companies engaged in alleged tortious conduct outside of Texas that was expressly aimed at Texas, knowing that the brunt of the injury from their conduct would be felt by USRT in Texas.

Reid's Breach-of-Contract Claim

Reid alleges that the Italian Companies breached an oral joint-venture agreement with USRT that allegedly was formed in Italy in December of 1997. Reid claims the Italian Companies breached this agreement by excluding USRT from the Plan and by failing to share revenues received from the execution of the Plan. The Plan contemplated obtaining rights from the Russian government to certain orbital slots for communications satellites. These satellites were to have been manufactured by Alenia in Italy with financing from the Italian government, and then placed in geosynchronous orbit over Russia by means of launches from stations located in Russia. Reid's affidavit indicates that, on May 19, 1999, in Rome, Alenia and USRT discussed the possibility of USRT transferring any and all rights in the Plan to Alenia; however, there is no indication in the record that such a transfer ever occurred.[6] Rather, Reid's affidavit states that he and Jon Reed were terminated from their respective positions at USRT in August of 1999, immediately after they refused to go along

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[6] Virgilio testified at his deposition that he did meet with a representative of Inspace (Topalov) and Capra on May 19, 1999, but that Viriglio did not participate in any conversations about transferring anything away from USRT. However, for purposes of this appeal, we presume for the sake of argument that the discussion occurred as stated in Reid's affidavit.

with such a transfer of rights by USRT.[7] According to Reid, after these events, in late 1999, Alenia began implementing the Plan without USRT's participation. Virglio's deposition shows that, on December 20, 1999, Alenia sent a letter to Siniscalchi in Illinois, as a representative of USRT, stating that the May 12, 1998 MOA was no longer in effect and indicating that there was no relationship between USRT and Alenia regarding the Plan. Therefore, the Italian Companies' alleged breach of the purported oral joint-venture agreement occurred in late 1999, when, Reid claims, the Italian Companies put the Plan into effect without USRT's participation.[8]

Reid asserts his claims based on his stock ownership in USRT Holdings and by means of a double derivative action in which, acting on behalf of USRT Holdings, he asserts a claim on behalf of USRT. *See* TEX. BUS. CORP. ACT art. 5.14K (stating that derivative actions involving foreign corporations are governed by the law of the state of incorporation, except as to procedural issues not relating to the internal affairs of the corporation); *Sternberg v. O'Neil*, 550 A.2d 1105, 1124 (Del. 1988) (describing double derivative action under Delaware law). Though Reid is asserting a breach-of-contract claim that allegedly belongs to USRT, any recovery in this case would go to USRT Holdings, not USRT. *See Sternberg*, 550 A.2d at 1124.

Reid asserts that this breach-of-contract claim arises from or relates to the following contacts with Texas:

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[7] Reid's affidavit states that USRT terminated Reed in August of 1999, and that USRT terminated Reid from his position as manager and board member in August of 1999. However, Reid's affidavit states USRT did not terminate Reid from his position as chief financial officer until September 8, 1999.

[8] In conducting the jurisdictional analysis, we do not adjudicate the merits of Reid's claims, and it should be noted that, in a deposition taken in September of 2002, Viriglio denied that Alenia had taken any active role in implementing the Plan.

- Alenia's alleged joint-venture agreement with USRT, a company that Reid claims had a principal place of business in Houston, Texas, at all material times;
- Alenia's negotiation in Houston, Texas of the January 27, 1998 MOA relating to the alleged joint venture;
- Alenia's entering into the MOAs that contemplated performance, in part, in Texas;
- Alenia's numerous communications with Texas by telephone and facsimile;
- Alenia's wiring money to USRT in connection with the alleged joint venture.

In many respects the facts are not disputed, but the parties vigorously dispute the principal place of business of USRT. Reid claims that it is in Texas, and the Italian Companies claim it is in Georgia. Aksamentov admitted in his affidavit that the MOAs between Alenia and USRT state that USRT's principal place of business is in Roswell, Georgia. Further, USRT sent Alenia a document entitled "Brief History of USRT" that stated "[o]perations of USRT are directed from USRT's offices in Atlanta, Georgia." Other evidence suggests the principal place of business may have been in Texas. Aksamentov testified that, in January of 1998, he sent Alenia a copy of USRT's "operating agreement." Although he does not further describe this document, and though our record contains no document by that name, we presume for the sake of argument that Aksamentov sent Alenia the USRT Limited Liability Company agreement that is contained in our record. This document states that as of January 3, 1997, the principal office of USRT is in Houston, Texas.

Under the applicable standards for evaluating the conflicting evidence as to the location of USRT's principal place of business, we conclude that there is legally and factually sufficient evidence to support the trial court's implied finding that USRT had a principal place of business in Texas from its creation until August of 1999. However, we find the evidence

legally insufficient to support an implied finding that USRT's principal place of business was in Texas after Reed's termination in August of 1999. The uncontroverted evidence shows that USRT never had any employees, that USRT did not compensate its officers, and that the only activities conducted by USRT were actions taken by its officers relating to the Plan. In this context, it is somewhat difficult to determine what the principal place of business of USRT was at any given time. Nonetheless, there is no evidence in the record of any remaining officers operating in Texas, or of any activity by USRT in Texas, after USRT terminated Reed in August of 1999.[9]

Based on our evaluation of the quality and nature of the Italian Companies' contacts with Texas, we conclude that their alleged breach of contract did not arise from or relate to these contacts. *See Guardian Royal Exchange Assur., Ltd.*, 815 S.W.2d at 224 n.11 (Tex. 1991) (stating that, in analyzing minimum contacts, it is not the number, but rather the quality and nature of the nonresident defendant's contacts with Texas that is important). The Italian Companies are alleged to have breached an oral joint-venture agreement, allegedly created in Italy, that concerned the Plan — a program that was centered in Italy and Russia and involved financing from the Italian government and approval of the Russian government.

The Italian Companies allegedly breached this contract in late 1999, when they went forward with the Plan, in Italy and Russia, without USRT's participation. At the time of this alleged breach, USRT did not have its principal place of business in Texas. Further, after October of 1998, and at the time of the alleged breach, USRT was wholly owned by USRT Holdings, which is ninety percent owned by an Italian citizen

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[9] The record shows that after Reed's departure, Reid, a Canadian citizen, continued as chief financial officer until September 8, 1999, when he ceased to be an officer. The others continuing to serve as officers were Siniscalchi, an alleged Illinois resident, and Capra, a citizen and resident of Italy.

(Capra) and ten percent owned by a Canadian citizen (Reid). Even though USRT's principal place of business may have been in Texas until August of 1999, Reid's claim seeking monetary recovery in favor of USRT Holdings — based on the breach of an alleged agreement made in Italy and allegedly breached in Russia and Italy — does not arise from or relate to the Italian Companies' purposeful contacts with Texas. *See American Type Culture Collection, Inc.*, 83 S.W.3d at 806; *Magnolia Gas Co. v. Knight Equip. & Mfg. Corp.*, 994 S.W.2d 684, 691–93 (Tex. App.—San Antonio 1998, no pet.) (finding no specific jurisdiction over contract assignees despite contract with Texas corporation, partial performance in Texas, communications with Texas, and sending payments to Texas).

Contracting with a Texas entity alone does not satisfy the minimum-contacts requirement. *See Old Kent Leasing Servs. Corp. v. McEwan*, 38 S.W.3d 220, 230 (Tex. App.—Houston [14 Dist.] 2001, no pet.). Here, there is also some evidence of funds being credited to a USRT account with a Texas address. Although it is not clear that Alenia knew that the payment was going to a Texas account because the wiring instructions indicated that the money was being sent to a bank in Pennsylvania, to be forwarded to USRT, the record contains evidence that Alenia wired $50,000 to USRT and that this amount was credited to a USRT account with an address in Houston, at a time when USRT's principal place of business was in Texas. Nevertheless, sending funds to Texas is not determinative. *See Shell Compañia Argentina De Petroleo, S.A. v. Reef Exploration, Inc.*, 84 S.W.3d 830, 839 (Tex. App.—Hous. [1 Dist.] 2002, no pet.). Likewise, numerous telephone and facsimile communications with people in Texas relating to an alleged contract do not establish minimum contacts. *TeleVentures, Inc. v. International Game Tech.*, 12 S.W.3d 900, 910 (Tex. App.—Austin 2000, pet. denied); *Magnolia Gas Co.*, 994 S.W.2d at 691–92.

Reid relies on *Fish v. Tandy Corp.*, 948 S.W.2d 886, 895 (Tex. App.—Fort Worth 1997, pet. denied). The *Fish* court found specific jurisdiction in a Texas corporation's action for

a declaration of the rights and duties under a letter agreement executed by the nonresident defendant and the Texas corporation after negotiations that included personal visits by the defendant to Texas. *See id.* at 890–95. In this case, however, the basis of Reid's suit is his allegation of an oral joint-venture agreement allegedly formed during a meeting in Italy in December of 1997. There is no evidence of prior negotiations regarding this alleged joint venture in Texas. Therefore, we conclude *Fish* is distinguishable.

Although the evidence shows that two Alenia representatives negotiated the terms of the January 27, 1998 MOA during a one-day meeting in Houston, Alenia signed this document in Italy. Furthermore, the January 27, 1998 MOA was superseded by the May 12, 1998 MOA, which contained a choice of law provision mandating application of United Kingdom law and providing for arbitration in London. The May 12, 1998 MOA did recite that, upon the execution of a legally enforceable contract and upon acquiring sufficient financing, Alenia would purchase fifty percent equity in USRT. However, any obligations that might have arisen under the May 12, 1998 MOA were expressly conditioned on the acquisition of credit facilities for $450 million and $100 million. The parties do not dispute that this financing was never obtained. In this context, we conclude that negotiation of a superseded MOA during a one-day meeting in Houston and the potential obligation to purchase USRT stock that never came to fruition are not sufficiently related to Reid's claims to support specific jurisdiction.[10] *See TeleVentures, Inc.*, 12 S.W.3d at 910.

Reid's Tort Claims

Reid also alleges that the Italian Companies engaged in tortious conduct, in part, in Texas. According to his pleadings, the Italian Companies breached fiduciary duties to

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[10] To the extent that Reid alleges tortious conduct based on the same actions alleged under the breach-of-contract theory, the same analysis applies.

USRT by wrongfully removing USRT from the alleged joint venture, converting and misappropriating the joint venture's assets, and usurping the joint venture's business opportunities. However, based on the record before us, the only asset that Reid claims was converted and the only opportunity he claims was usurped was USRT's alleged rights to develop and profit from the Plan as part of the alleged joint venture with Alenia. Therefore, though Reid is entitled to plead various torts, both his breach-of-fiduciary-duty claim and his conversion claim are based on Alenia's alleged wrongful removal of USRT from the alleged joint venture. The record shows that if Alenia continued the development and implementation of the Plan without USRT, it would have done so in Italy and Russia. Further, Alenia's December 20, 1999 letter to USRT — stating that the May 12, 1998 MOA was no longer in effect — was sent to Siniscalchi in Illinois. After reviewing the record, we find no evidence that this alleged wrongful removal occurred in Texas in such a manner as to support specific jurisdiction. *See BMC Software Belgium, N.V.*, 83 S.W.3d at 796–97 (finding no evidence of tort committed in Texas).

Reid also asserts that Capra, Siniscalchi, and the Italian Companies conspired to wrongfully remove USRT from the alleged joint venture. However, the only evidence in the record that arguably might relate to such a conspiracy is Reid's description of a phone call from Siniscalchi in which Siniscalchi allegedly described discussions in Rome, between Viriglio of Alenia and Capra of USRT. Reid claims these discussions occurred in Italy, not in Texas. Even if Reid were in Texas when Siniscalchi telephoned him,[11] Siniscalchi's act in making this phone call to Reid cannot be counted as a contact of Alenia with Texas, because Siniscalchi was an officer of USRT, not an agent or representative of Alenia. *See National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 773 (Tex. 1995) (stating alleged co-conspirator's contacts with Texas

[11] The record does not reflect where Reid or Siniscalchi were located during this phone call.

cannot be counted as contact of other alleged co-conspirators). There is no evidence that any alleged conspiratorial conduct by the Italian Companies occurred in Texas.[12]

Reid also claims that Alenia directed Reed, a Texas resident, to commit a tort in Texas by asking him to approve and participate in an allegedly tortious proposal for USRT to transfer its rights in the alleged joint venture to Alenia in exchange for payments to Reed and others. However, there is no evidence that Alenia ever directed Reed to do this. In any event, Reid testified in his affidavit that Reed refused to be part of this alleged proposal, and Reid does not allege or seek recovery for any damages based on any conduct by Reed in following Alenia's alleged direction to participate in this proposal.

Finally, as to Reid's contention that the Italian Companies tortiously interfered with agreements between USRT and the Russian company Inspace, there is no evidence in the record that any of the alleged interference took place in Texas. *See BMC Software Belgium, N.V.*, 83 S.W.3d at 796–97 (finding no evidence of tort committed in Texas). In sum, the record contains no evidence that the Italian Companies' alleged tortious conduct occurred in Texas.

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[12] Reid asserts that *General Elec. Co. v. Brown & Ross Int'l Distributors, Inc.* stands for the proposition that a defendant who participates in a conspiracy known to impact Texas has satisfied the requirements for specific jurisdiction. *See* 804 S.W.2d 527, 533 (Tex. App.—Houston [1st Dist.] 1990, writ denied). We disagree. Although the analysis is difficult because the *Brown & Ross* court never identifies what tort claims the plaintiff in that case was asserting, the court did not state that mere participation in a conspiracy known to impact Texas was sufficient. *See id.* Rather, the *Brown & Ross* court concluded that there was jurisdiction because the record showed that the defendant in question knew *his conduct* would affect Texas customers. *See id.* This is consistent with the *Calder v. Jones* line of cases discussed in the next section. *See Calder v. Jones*, 465 U.S. 783, 789–90, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804 (1984).

Brunt of Alleged Injury under Reid's Tort Theories

Reid also asserts that, even if Alenia's allegedly tortious conduct occurred outside of Texas, the exercise of specific jurisdiction is still appropriate because Alenia's actions were expressly aimed at Texas and Alenia knew that the brunt of the alleged injury caused by this conduct would be felt by USRT in Texas. *See Calder v. Jones*, 465 U.S. 783, 789–90, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804 (1984); *Rittenmeyer v. Grauer*, 104 S.W.3d 725, 735 (Tex. App.—Dallas 2003, no pet.). Even assuming for the sake of argument that Alenia engaged in tortious conduct and knew that this conduct would harm USRT, Reid's petition and affidavit both state that this conduct occurred after USRT terminated Reid and Reed. At the time of the alleged tortious conduct, USRT was a Delaware corporation owned by USRT Holdings, with no employees and no officers or directors in Texas. Therefore, we conclude Alenia could not have expressly aimed its allegedly tortious conduct at Texas or known that the brunt of any injury from such conduct would be felt in Texas.

Reid's affidavit indicates that on May 19, 1999, an Alenia representative (Viriglio) and Capra, while in Rome, discussed the possibility of USRT transferring its rights in the alleged joint venture to Alenia in exchange for a lump sum to be paid to Capra, Siniscalchi, Reed, and Reid. There is no evidence that any such transfer ever occurred. Instead, the evidence shows Alenia sent a letter dated December 20, 1999, stating the May 12, 1998 MOA was no longer in effect, and Reid alleges that in late 1999, the Italian Companies implemented the Plan without USRT's participation. Therefore, this alleged proposal never came to fruition and cannot be evidence that Alenia committed a tort directed at Texas with the knowledge that the brunt of the injury would be felt in Texas. Accordingly, we find personal jurisdiction cannot be based on this theory.

On this record, we conclude that the Italian Companies' very limited contacts with Texas relating to the subject matter of this lawsuit are insufficient to support the exercise of spe-

cific jurisdiction.

B. Did the trial court properly conclude that it could exercise personal jurisdiction over the Italian Companies based on general jurisdiction?

General jurisdiction is a more demanding minimum-contacts analysis, requiring a showing that the defendants conducted substantial activities within the forum. *CSR, Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996). General jurisdiction does not require that the plaintiff's claims arise from or relate to the defendants' activities purposefully directed to Texas. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984). General jurisdiction exists when the defendant in question has "continuous and systematic general business contacts" with the forum state. *Id.*, 466 U.S. at 416, 104 S. Ct. at 1873; *American Type Culture Collection, Inc.*, 83 S.W.3d at 809. General jurisdiction is based upon the concept of a bargain between the nonresident defendant and the forum state. If the defendant has established continuous and systematic general business contacts with the state, it is deemed to have purposely availed itself of the protections and benefits of the forum's law, and thereby to have consented to suit in the forum. *See Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375 (5th Cir. 1987). In conducting a general-jurisdiction analysis, we are concerned with the quality rather than the quantity of the contacts. *See American Type Culture Collection, Inc.*, 83 S.W.3d at 809–10. In assessing the quality of the contacts, we do not view each contact in isolation; rather, we carefully investigate, compile, sort, and analyze all contacts to determine if together they are sufficient to support general jurisdiction. *See id.* at 809.

In addition to the contacts identified in the specific-jurisdiction analysis, Reid asserts the following contacts support the trial court's implied finding of general jurisdiction:

- Under Alenia's contract with the Italian Space Agency relating to the International Space Station Project ("Space Station Project"), one Alenia em-

ployee worked as a representative of the Italian Space Agency at an office in the Johnson Space Center (the "Space Center") in Texas from 1996 until 2000, another Alenia employee worked in the same capacity from November of 1999 to the present, and another from December of 2001 to the present.

- Since 1998, at least 117 employees of Alenia have traveled to the Space Center in connection with the Space Station Project, averaging at least fifty employees traveling per year, with an average of more than ten days in Texas per employee.
- Since 1998, at least sixty different employees of Alenia have directed communications by telephone, facsimile, mail, or e-mail to individuals located at the Space Center in connection with the Space Station Project.
- On at least two occasions, Alenia sent a shipment from Italy to the Space Center.
- The Italian Companies had a contract with The Dee Howard Company, a Texas corporation and subsidiary of Finmeccanica, that contains a Texas choice-of-law provision and contemplates performance in Texas.

Since 1996, under its contract with the Italian Space Agency, Alenia has had at least one and sometimes two employees at the Space Center in Texas. Acting as representatives of the Italian Space Agency, these Alenia employees provide technical support and liaison services relating to the Space Station Project. The Space Station Project has nothing to do with the dispute that is the basis of this suit. Although the presence of at least one Alenia employee in Texas since 1996 has been continuous, our jurisdictional inquiry and analysis does not end there. We must determine if this contact and the other contacts reflected in the record constitute "continuous and systematic general business contacts" with Texas. *See Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416, 104 S. Ct. at 1873; *American Type Culture Col-*

lection, Inc., 83 S.W.3d at 809.

The record shows the one or two Alenia employees present at the Space Center were given use of a telephone and an office at the Space Center. The extension for this telephone was listed in the phone directory for the Space Center under the general heading "Italian Space Agency" and an individual entry under a subheading "Alenia Representative." These employees were present at the Space Center pursuant to a $300 million contract between Alenia and the Italian Space Agency. The record does not reflect how much Alenia has been paid for providing these employees on location at the Space Center; however, given the nature and magnitude of the contract (to design and build components of the Space Station Project), the compensation for providing these two employees is likely a small part of the $300 million contract price. Further, the record shows the Italian Companies are organized and exist under Italian law, have principal places of business in Italy, are not qualified or authorized to conduct business in Texas, do not maintain an inventory in Texas, and have no sales representatives, distributors, brokers or wholesalers in Texas. Moreover, nothing in the record suggests the Italian Companies have undertaken any efforts to exploit Texas markets. They have no bank accounts or listings in any public telephone directory in Texas. They have not commenced suit in any Texas state courts or filed claims in any Texas proceedings. They have not paid taxes or franchise fees in Texas, do not regularly advertise in Texas, and have no authorized agents to accept service of process in Texas.

Reid argues that general jurisdiction exists because Alenia has had an office at the Space Center since 1996. However, having an office in the forum state does not require a finding of general jurisdiction. *See Submersible Sys., Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 419 (5th Cir. 2001) (having a construction project and maintaining an office with three employees in forum state did not satisfy standard for general jurisdiction); *Villar v. Crowley Maritime Corp.*, 780 F. Supp. 1467, 1480–81 (S.D. Tex. 1992) (stating that simply having an office in the forum state does not es-

tablish general jurisdiction), *aff'd* 990 F.2d 1489 (5th Cir. 1993). The significance of this contact depends on the type and nature of office maintained. If a defendant maintains a permanent general business office through which it solicits business in Texas, then this factor tends to weigh strongly in favor of general jurisdiction. *See James v. Illinois Cent. Railroad Co.*, 965 S.W.2d 594, 598 & n.1 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (holding there was general jurisdiction where defendant solicited business in Texas through general business office). There is nothing to suggest Alenia maintained such an office in Texas. Rather, the record indicates that (1) Alenia was provided the use of an office, including a telephone line, at the Space Center to allow its employees to provide technical support and liaison services relating to the Space Station Project; and (2) this office contained the logo for the Italian Space Agency, not the logo for Alenia. The record indicates that Alenia does not utilize this office to promote or market its goods or services in Texas, or for any purpose other than supporting the Space Station Project. The nature of this office and its very limited purpose and function significantly diminish the quality of the Italian Companies' contacts with Texas.[13]

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[13] Reid asserts that *Perkins v. Benguet Consolidated Mining Co.* shows that a company need not target the forum market for there to be general jurisdiction. *See* 342 U.S. 437, 72 S. Ct. 413, 96 L. Ed. 485 (1952). However, the *Perkins* case involved unusual facts. In *Perkins*, the defendant company's regular business operations in the Philippines were completely halted during the occupation of the Philippines by Japan, and the company's principal stockholder effectively transferred the company's main office to Ohio during the Japanese occupation of the Philippines. *See id.*, 342 U.S. at 447–49, 72 S. Ct. at 419–20. *Perkins* may indicate that targeting the forum-state market is not necessary if the defendant's regular business operations are halted and the center of corporate decision-making is transferred to the forum state, but these are not the facts before us in this case. *See American Type Culture Collection, Inc.*, 83 S.W.3d at 809–10 (distinguishing *Perkins*).

Further, the record shows that the only reason Alenia sent employees to the Space Center is that this location was chosen by the National Aeronautics and Space Administration ("NASA") as the location for these services. Alenia has contracts with the Italian Space Administration, the European Space Administration, and a German space agency relating to the Space Station Project. The record indicates that (1) these contracts require Alenia to perform various services in coordination with NASA; (2) the contracts do not specifically require Alenia to perform services in Texas; (3) NASA decided that some of these services would be performed at the Space Center in Texas; and (4) before entering into these contracts Alenia understood that some of its services would be performed at the Space Center. NASA, rather than the Italian Companies, decided that some of Alenia's services under the contracts with three European entities would be performed at the Space Center. We conclude that the nature of this arrangement also significantly diminishes the quality of these contacts and does not indicate that the Italian Companies purposefully directed their business activity at Texas. *See American Type Culture Collection, Inc.*, 83 S.W.3d at 809 (discounting quality of contacts regarding defendant's attendance at five conferences in Texas because defendant did not select the location of the conferences); *Reyes v. Marine Drilling Cos., Inc.*, 944 S.W.2d 401, 402–04 (Tex. App.—Houston [14th Dist.] 1997, no writ) (discounting quality of contacts where defendant sent representatives to Texas at least 204 times to perform quality-assurance inspections, because these inspections were necessitated by defendant's contractual obligations with the United States government); *Conner v. ContiCarriers and Terminals, Inc.*, 944 S.W.2d 405, 417–18 (Tex. App.—Houston [14th Dist.] 1997, no writ) (plurality op.) (discounting quality of contacts in which defendant's customer, not defendant, chose Texas destination for transportation services); *Asarco, Inc v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (finding no jurisdiction and discounting quality of contacts regarding 20 port calls of vessel in forum state because company that managed vessels did not choose

where vessels would make port); *Conner v. Bouchard Transp. Co., Inc.*, 1994 A.M.C. 258, 1993 WL 388274, at *1–*3 (E.D. Pa. 1993) (finding no general jurisdiction despite over 100 port calls in forum state by defendant-owner's vessel, because all visits were prompted by chartering agreement in which charterer determined destination of defendant's vessels); *American Overseas Marine Corp. v. Patterson*, 632 So.2d 1124, 1126–30 (Fla. App. 1994) (finding no jurisdiction and discounting quality of contacts relating to port calls in forum state because they were not by the choice of defendants but at the direction of the United States military under contracts with the United States).

The record also contains a contract between Alenia and The Dee Howard Company, a Texas corporation owned by a subsidiary of Finmeccanica. Though this contract contains a Texas choice-of-law provision, it has no forum-selection provision. Reid asserts that by agreeing to this Texas choice-of-law provision, Alenia availed itself of the benefits and protections of Texas law and consented to being sued in Texas. We disagree. By agreeing to a Texas choice-of-law provision, a party does not avail itself of any protection from Texas courts or voluntarily submit to personal jurisdiction in Texas courts, absent an express understanding to that effect. *See Moni Pulo Ltd. v. Trutec Oil and Gas, Inc.*, —S.W.3d—, —, 2003 WL _____, at *2 & n.15 (Tex. App.—Houston [14th Dist.] Dec. 4, 2003, no pet. h.). There is no evidence in the record of an express understanding that Alenia submitted to the jurisdiction of Texas courts by executing the contract with The Dee Howard Company. Moreover, the significance of this contract and its Texas choice-of-law provision is diminished by the fact that the contract is contingent upon Alenia seconding employees to The Dee Howard Company to perform the services anticipated to be performed under the contract. The record contains no evidence that Alenia ever seconded employees to The Dee Howard Company or that any services were ever performed under this contract. In this context, and from a qualitative standpoint, we do not view this contract and its choice-of-law provision as a significant contact in the

general-jurisdiction analysis.

In *Reyes v. Marine Drilling Cos., Inc.*, this court found no general jurisdiction despite the following contacts of the defendant with Texas:

(1) The defendant had purchased goods in excess of $183 million in Texas from at least 471 persons and/or companies in Texas.

(2) The defendant had purchased over $63.3 million in products from a company in Houston, Texas and had entered into contracts with that company for equipment purchases and repairs.

(3) The defendant, as purchaser, had entered into 303 contracts and/or agreements with a company in Conroe, Texas.

(4) The defendant advertised for employees in five periodicals in Texas.

(5) The defendant had sold $851,511.88 worth of scrap metal to Texas companies, all of which was delivered in Mississippi.

(6) The defendant had sent representatives to Texas on at least 204 occasions to perform quality-assurance inspections necessitated by the defendant's obligations under contracts with the United States.

Despite the large quantity of contacts in *Reyes*, this court concluded there was no personal jurisdiction under a general-jurisdiction analysis because the record did not show a general business presence in Texas. *See id.* at 404–05. The defendant did not have a business office in Texas and did not distribute or market its products in Texas. *See id.* Similarly, in this case, there is no evidence the Italian Companies advertised or promoted their goods or services in Texas, solicited business in Texas, sold their goods or services to a Texas entity, established a general business office or general business presence in Texas, or targeted Texas markets.

After carefully analyzing the nature and quality of the Italian Companies' contacts with Texas, we find no continuous and systematic general business contacts with Texas such that these companies can be deemed to have consented to being sued in Texas. *See Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416, 104 S. Ct. at 1873 (holding there was no general jurisdiction even though defendant sent its chief executive officer to Texas for a contract-negotiating session, accepted into its bank account checks drawn on a bank in Texas, purchased $4 million of goods and equipment from a company in Texas, and sent employees to Texas for training and technical consultation); *Submersible Sys., Inc.*, 249 F.3d at 419–21 (holding that having a construction project in forum state and maintaining an office with three employees in forum state did not satisfy standard for general jurisdiction); *Strick Corp. v. A.J.F. Warehouse Distribs., Inc.*, 532 F. Supp. 951, 956–60 (E.D. Pa. 1982) (holding there was no general jurisdiction despite defendant's office in forum over four-year period because record did not show that defendant targeted the forum-state market or made a substantial number of sales in the forum); *CSR, Ltd.*, 925 S.W.2d at 595 (stating there must be an indication that defendant intended to serve the Texas market before personal jurisdiction may be found); *Michel v. Rocket Eng'g Corp.*, 45 S.W.3d 658, 671–82 (Tex. App.—Fort Worth 2001, no pet.) (holding record did not support general jurisdiction because it did not show that defendant created a general business presence in Texas through continuing and systematic activities); *Reyes*, 944 S.W.2d at 402–04 (holding there was no general jurisdiction despite defendant's purchase of large amounts of supplies from Texas companies and sending representatives to Texas at least 204 times to perform quality-assurance inspections). Therefore, we conclude a Texas court may not exercise personal jurisdiction over the Italian Companies under a general-jurisdiction theory.

C. Did the trial court properly conclude that exercising personal jurisdiction over the Italian Companies would comport with traditional notions of fair

play and substantial justice?

In addition to sufficient minimum contacts with Texas, federal due process requires that the exercise of personal jurisdiction comport with traditional notions of fair play and substantial justice. *See Guardian Royal Exch. Assur., Ltd.*, 815 S.W.2d at 228. In deciding this issue, the court should consider the following factors:

- the burden on the defendants;
- the interests of the forum state in adjudicating the dispute;
- the plaintiff's interest in obtaining convenient and effective relief;
- the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and
- the shared interest of the several states in furthering fundamental substantive social policies.

Id. When, as here, the defendants are residents of another nation, the court should also consider:

- the unique burdens placed on the defendant who must defend itself in a foreign legal system;
- the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court; and
- the United States government's interest in its foreign-relations policies.

Id. at 229.

In considering the burden the Italian Companies would face were they forced to defend in Texas, we note that the record indicates that all official business records of USRT relating to the Plan are in Houston, Texas, and that potential witnesses Aksamentov, Reed, and Larry Bell reside in Texas. However, Reid, the plaintiff, resides in Canada. Other poten-

tial witnesses also reside outside of Texas — Siniscalchi (residing in Illinois), Capra (residing in Italy), current and former Alenia employees and Finmeccanica employees (residing in Italy), and third-party witnesses from Inspace and RSCC (residing in Russia). Though Alenia employees have traveled to Texas under contracts that Alenia has with the Italian Space Agency, the European Space Agency, and a German space agency, the record shows that, other than a suit filed by the former shareholders of USRT, the Italian Companies have never been sued in Texas. Allowing the suit to proceed in Texas would be expensive and burdensome for the Italian Companies and it would force them to defend against Reid's claims in a foreign legal system. *See id.* at 229.

Most significantly, we find that the interests of Texas in adjudicating this dispute are minimal. Reid, a Canadian resident and citizen, is asserting a double derivative action against two Italian companies, which, if successful, would result in a judgment in favor of USRT Holdings, a Delaware holding company owned ninety percent by an Italian resident and ten percent by a Canadian resident (Reid). The claim upon which USRT Holdings would recover at the request of Reid belongs to USRT. Although there is evidence to support a finding that USRT's principal place of business was in Texas through August of 1999, there is no evidence that its principal place of business has been in Texas since that time. Because this dispute does not involve any Texas entity and cannot result in a judgment in favor of any Texas entity, we conclude that Texas's minimal interest in this dispute strongly militates against the assertion of jurisdiction in this case. *See id.* at 23–33 **[*sic*, 223-33]** (holding exercise of jurisdiction would offend traditional notions of fair play and substantial justice where Texas did not have a compelling interest in providing a forum for resolution of claims in which plaintiffs sought reimbursement for a non-Texas insurer, even though two of the plaintiffs were Texas corporations with principal places of business in Texas and even though the facts of the case involved a deceased Texas employee); *Bearry*, 818 F.2d at 377 (holding assertion of juris-

diction would be unreasonable primarily because suit implicated virtually no distinct interest of Texas).

Though the parties have thoroughly briefed most other aspects of the jurisdictional analysis, they have provided little assistance in assessing the procedural and substantive policies of other nations whose interests would be affected by a Texas court's assertion of jurisdiction. We note, however, that Reid seeks a multi-million-dollar judgment against Alenia, an Italian company, and its parent, Finmeccanica, an Italian company in which Italian government entities own a 34 percent interest. Further, Reid seeks to recover based on an alleged plan that contemplated obtaining rights from the Russian government to certain orbital slots for communications satellites, manufactured by Alenia in Italy with financing from the Italian government, and placed in geosynchronous orbit over Russia by means of launches from stations in Russia. These facts raise important concerns regarding the substantive policies of Italy and Russia and the impact that the exercise of jurisdiction might have on the United States government's foreign-relations policies vis-a-vis these countries.

As for Reid's interest in obtaining convenient and effective relief, we note that Reid testified that litigating this matter in Italy would place a tremendous financial burden on him. Certainly litigating this dispute in Texas may be more cost-effective and convenient for Reid; however, it is not clear that his interest in effective relief will be better served by a Texas judgment. The United States is not party to any multilateral convention regarding recognition of foreign judgments. *See* Alan Reed, *A New Model of Jurisdictional Propriety For Anglo-American Foreign Judgment Recognition and Enforcement: Something Old, Something Borrowed, Something New?* 25 LOY. L.A. INT'L & COMP. L. REV. 243, 245 n.1 (2002). To obtain effective relief against the assets of the Italian Companies in Italy, if he becomes entitled to it, Reid, at some point, will have to convince the appropriate decisionmakers in the Italian judicial system that, under Italian law, he is entitled to enforce a valid Texas judgment

against the Italian Companies, despite the absence of a bilateral treaty on this subject between Italy and the United States. Thus, although it may be less expensive and more convenient for Reid to litigate in Texas, the relief he can obtain here against the Italian Companies may not be more effective. *See Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1273 (9th Cir. 1981) (stating that potential difficulties enforcing American judgment in foreign country may be considered in weighing the plaintiff's interest in obtaining convenient and effective relief); *In re Baldwin-United Corp.*, 607 F. Supp. 1312, 1330 (S.D.N.Y. 1985) (stating, in context of class-action settlement, that effective relief is essentially a judgment that is collectible and practical). Therefore, we find this factor does not weigh strongly in favor of the reasonableness of a Texas court exercising personal jurisdiction over the Italian Companies.

After considering all applicable factors and interests, we conclude that the exercise of personal jurisdiction by a Texas court over the Italian Companies would be unreasonable and would offend traditional notions of fair play and substantial justice.

IV. CONCLUSION

In grappling with these difficult jurisdictional issues, the trial court observed that this case presented "a tough call," but ultimately found the Italian Companies subject to jurisdiction in Texas and denied their special appearances. We agree with the trial court's characterization, but not with its ruling. We find no basis for personal jurisdiction. Reid's claims do not arise from or relate to the Italian Companies' purposeful contacts with Texas and thus provide no basis for specific jurisdiction. Moreover, the record does not show that the Italian Companies have established continuous and systematic general business contacts with Texas sufficient to support general jurisdiction. Furthermore, the exercise of personal jurisdiction over them would be unreasonable and would offend traditional notions of fair play and substantial justice.

Having found that the Italian Companies are not subject to the jurisdiction of the trial court, we sustain the two issues they have asserted on appeal, reverse the trial court's order denying their special appearances, and remand this case to the trial court with instructions to dismiss the claims against the Italian Companies for lack of personal jurisdiction.

/s/ Kem Thompson Frost

Justice

Judgment rendered and Majority Opinion filed December 23, 2003.

Panel consists of Justices Edelman, Frost, and Seymore. (Edelman, J., dissents without filing an opinion).

December 23, 2003

[State Seal]

JUDGMENT

The Fourteenth Court of Appeals

ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A.,
Appellants

NO. 14-03-00366-CV V.

DENNIS A. REID, Appellee

This cause, an appeal from the order in favor of appellee, DENNIS A. REID, signed March 13, 2003 was heard on the transcript of the record. We have inspected the record and find error in this order. We therefore order the order of the court below **REVERSED** and **REMAND** the cause with instructions to dismiss the claims against appellants ALENIA SPAZIO, S.P.A. and FINMECCANICA, S.P.A. for lack of personal jurisdiction and for proceedings in accordance with the court's opinion.

We order appellee, DENNIS A. REID, to pay all costs incurred in this appeal. We further order this decision certified below for observance.

CAUSE NO. 2002-12305

DENNIS A. REID,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff,	§	
	§	
v.	§	
	§	HARRIS COUNTY,
	§	TEXAS
USRT HOLDINGS,	§	
L.L.C., U.S. RUSSIAN	§	
TELECOMMUNICA-	§	
TIONS, L.L.C.,	§	
VINCENZO DAVIDE	§	
SINISCALCHI,	§	
GIORGIO CAPRA,	§	
ALENIA SPAZIO AND	§	
FINMECCANICA,	§	
	§	
Defendants.	§	281ST JUDICIAL
	§	DISTRICT

ORDER DENYING SPECIAL APPEARANCES OF ALENIA SPAZIO AND FINMECCANICA

Came on for consideration the Special Appearances filed by Defendants Alenia Spazio and Finmeccanica (collectively "Defendants") in the above-styled and numbered cause. After considering the pleadings on file, special appearances, response thereto, and admissible evidence, the Court enters the following order pursuant to Rule 120a(4) of the Texas Rules of Civil Procedure:

It is hereby ORDERED, ADJUDGED and DECREED that the Special Appearances filed by Alenia Spazio and Finmeccanica are DENIED.

SIGNED this the 13 day of March, 2003.

/s/ Jane Bland
JUDGE PRESIDING

Justices

LESLIE BROCK YATES
JOHN S. ANDERSON
J. HARVEY HUDSON
WANDA MCKEE FOWLER
RICHARD H. EDELMAN
KEM THOMPSON FROST
CHARLES SEYMORE
EVA M. GUZMAN

[State Seal]

Fourteenth
Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

Chief Justice

ADELE HEDGES

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Thursday, April 08, 2004

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RE: Court of Appeals Number: 14-03-00366-CV
Trial Court Case Number: 02-12305

Style: Alenia Spazio, S.P.A. and Finmeccanica, S.P.A.
v.
Dennis A. Reid

Please be advised that on this date the Court **OVER-RULED** appellee's motion for rehearing in the above cause.

ED WELLS, CLERK

By _____
Deputy

Justices

LESLIE BROCK YATES
JOHN S. ANDERSON
J. HARVEY HUDSON
WANDA MCKEE FOWLER
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RE: Court of Appeals Number: 14-03-00366-CV
Trial Court Case Number: 02-12305

Style: Alenia Spazio, S.P.A. and Finmeccanica, S.P.A.
v.
Dennis A. Reid

Please be advised that on this date the Court **OVER-RULED** appellee's motion for en banc consideration in the above cause.

ED WELLS, CLERK

By _____
Deputy

[State Seal] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 04-0461 DATE: 8/26/2005
COA #: 14-03-00366-CV TC#: 2002-12305
STYLE: DENNIS A. REID
v. ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case. Justice Willett not sitting.

MAIL TO: MS. CLAUDIA WILSON FROST
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[State Seal] OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 04-0461 DATE: 3/10/2006
COA #: 14-03-00366-CV TC#: 2002-12305
STYLE: DENNIS A. REID
v. ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

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Supreme Court, U.S.
FILED
JUL 13 2006
OFFICE OF THE CLERK

No. 05-1586

In The Supreme Court of the United States

DENNIS A. REID,

Petitioner,

v.

ALENIA SPAZIO, S.p.A. and FINMECCANICA, S.p.A.,

Respondents.

On Petition For A Writ Of Certiorari To The Fourteenth Court Of Appeals Of Texas

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

While Petitioner attempts to raise three questions for this Court, none provide a basis for a grant of certiorari to the Texas court of appeals. Petitioner's first question presented – relating to the attribution of alleged co-conspirators' contacts with the forum state – focuses on an issue that he failed to raise in exhaustive state court proceedings. Thus, putting aside the merits of this question, it is not properly before this Court. Petitioner's second question presented – relating to the collective evaluation of contacts – is neither implicated by the opinion below, nor indicative of any split of authority among lower courts. Petitioner's third question presented – relating to third-party directed contacts with the forum state – is similarly based on a misreading of the opinion below and on inapposite case law.

LIST OF PARTIES

Petitioner Dennis A. Reid ("Petitioner" or "Reid"), a Canadian citizen, claims that he derivatively represents two Delaware companies in this action: U.S. Russian Telecommunications, LLC ("USRT") and its parent, USRT Holdings, LLC ("USRT Holdings"). Respondents are Alenia Spazio, S.p.A. ("Alenia") and Finmeccanica, S.p.A. ("Finmeccanica"), both Italian companies (collectively, the "Italian companies").[1]

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

ALS S.p.A., formerly Alenia Spazio, S.p.A., is a wholly-owned subsidiary of SO.GE.PA., S.p.A., which in turn is a wholly-owned subsidiary of Finmeccanica, S.p.A., a publicly-traded company listed on the Milan Stock Exchange. The Italian Ministry of Economy and Finance owns 33.8% of Finmeccanica's shares. No publicly held company owns more than 10% of Finmeccanica's shares.

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[1] For the purposes of this Brief in Opposition, Respondents accept Petitioner's statements of the "Opinions Below," "Jurisdiction," and "Constitutional Provisions Involved."

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COUNTER-STATEMENT OF THE CASE

I. Procedural History

On March 11, 2002, Petitioner, a Canadian citizen, filed suit against the Italian companies, Admiral Giorgio Capra ("Admiral Capra"), an Italian citizen residing in Italy, and Davide Siniscalchi ("Siniscalchi"), an Illinois resident, in Texas district court, Harris County, alleging six substantive causes of action, all of which involve an alleged joint venture agreement between USRT and Alenia. CR 9-12. Petitioner sues in a purported derivative capacity on behalf of USRT, LLC, a Delaware company that, after October 1998, was wholly owned by USRT Holdings, LLC, also a Delaware company.[2]

Alenia challenged personal jurisdiction by special appearance, which was denied by the Harris County trial court. The Texas Fourteenth Court of Appeals reversed, finding, in relevant part, that: (1) "[Alenia's] very limited contacts with Texas relating to the subject matter of this lawsuit are insufficient to support the exercise of specific jurisdiction"; (2) "a Texas court may not exercise personal jurisdiction over [Alenia] under a general-jurisdiction theory"; and (3) the exercise of personal jurisdiction would "offend traditional notions of fair play and substantial justice." Pet. App. 7, 17, 24, 28. Petitioner's Motion for Rehearing and Rehearing En Banc to the court of appeals was denied. Pet. App. 34-35.

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[2] Other members of USRT, including Dr. Valery Aksamentov and Jon Reed, chose to bring their own suit, based on the same facts but on a different legal theory, in federal court in Texas. The federal district court for the Southern District of Texas dismissed all of their claims against Alenia for lack of personal jurisdiction. *See Space Mktg., Inc. v. USRT Holdings, LLC*, No. H-01-4117 at *24-31 (S.D. Tex. Jul. 8, 2004).

Petitioner then sought review by the Supreme Court of Texas, which requested full merits briefing on the personal jurisdiction issues. The Supreme Court of Texas denied review, and Petitioner sought rehearing, which was also denied. Pet. App. 36-37.

II. The Decision of The Court of Appeals Was Correct and Consistent with Established Law

This lawsuit arises out of an alleged joint venture between Respondents Alenia and Finmeccanica, Italian corporations with their headquarters in Rome, Italy, and USRT, a Delaware corporation with offices in Georgia. The joint venture was negotiated in *Europe* and called for USRT to obtain rights from a *Russian* entity, under the authority of the *Russian* government, to certain specified orbital slots to be used for communications satellites over *Russia*; for Alenia, an *Italian* company, to manufacture the satellites in manufacturing facilities in *Italy*; for the *Italian* government to finance the project with *Italian* tax revenues; and for a *Russian* company to launch the satellites from ground stations located in *Russia* and to monitor these satellites in fixed orbits over *Russia*. SSCR 32-61. Rather than presenting an opportunity to address divergent precedents on issues of jurisdiction, the court of appeals' decision correctly applied well-settled legal principles to the unique facts of this case.

A. Alenia's Alleged Contacts Do Not Support Specific Jurisdiction

1. USRT Held Itself Out As A Georgia-based Company In Joint Venture Negotiations with Alenia

USRT was allegedly founded in 1997 by a Russian-born scientist to pursue a potential business opportunity to replace aging and obsolete satellites in Russian orbital slots, allocate some of the satellite capacity to the Russian government, and market the remaining capacity to private entities. CR 4-5. The Italian Government expressed an interest in the project, and appointed Admiral Capra, an officer of the Italian Navy and a member of the Board of Directors of the Italian Space Agency, and Siniscalchi, to explore financing for the project.

In late December 1997, Admiral Capra contacted Alenia and arranged for a meeting at his office in Rome between representatives of Alenia and the then president of USRT. CR 6, SSCR 178. Following this initial contact, on January 12, 1998, representatives of USRT and Alenia met in Rome to discuss cooperation on the potential satellites project. SSCR 180. At this meeting, USRT and Alenia negotiated and entered into the first of a series of non-binding memoranda of agreement ("MOAs") that roughly outlined potential areas of responsibility for the project. *Id.* 39-42.

On January 27, 1998, Alenia and USRT entered into a second MOA, which expressly superseded the January 12 MOA. SSCR 32-37. This MOA was negotiated in part during a meeting held by USRT representatives in Houston and attended by two Alenia employees, who spent a total of twenty-four hours in the State of Texas. *Id.* 27,

181.[3] Following the negotiations, the January 27 MOA was signed by Alenia in Rome. *Id.* 28.

On May 12, 1998, USRT and Alenia entered into and signed a new MOA in Moscow, which expressly superseded the January 12 and January 27 MOAs and declared them "null and void." SSCR 51-55.[4] The responsibilities of the parties that were set forth in the May 12 MOA were expressly conditioned on a grant of financing for the project from the government of Italy. *Id.* 53. Unlike the prior MOAs, the May 12 MOA explicitly provided for arbitration for "any dispute between the parties arising in connection with this MOA" in *London*, in accordance with "the laws of the United Kingdom." *Id.* 53-54. The May 12 MOA also stated that it could be "terminated by either party through 30 days written advance notice." *Id.* 53.

On May 15, 1998, USRT, Alenia, and InSpace JSC ("InSpace"), a Russian company, entered into an additional, three-way MOA related to the projects and orbital slots contemplated by the May 12 MOA. SSCR 57-61. The May 15 MOA, which was negotiated and signed in Moscow, expressly superseded a prior April 8 MOA between the same three parties concerning the same underlying project. *Id.* 59, 184. In addition, the May 15 MOA stated

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[3] Since USRT maintained no office space in Texas, the meeting took place in a conference room at the University of Houston; USRT representatives conceded that "USRT's principal place of business was listed in contracts as being in Georgia * * * because that is where we had office space." SSCR 69.

[4] Significantly, the May 12 MOA concerned different orbital slots than those covered by the January MOAs, which had been awarded to the French companies Alcatel and Aerospatiale. *Id.* 50, 190-91.

that it would expressly terminate sixty days from the date of the signature. *Id.* 61.

Each of the successive MOAs reflects that USRT was a company organized under the laws of Delaware, with its offices in Roswell, Georgia. Pet. App. 11. None of the MOAs mentioned any USRT relationship with the State of Texas. Moreover, none of the MOAs contemplated any future performance by any party in the State of Texas. In fact, the only MOA with any relation at all to Texas – the January 27 MOA that was partly negotiated during a one-day meeting in Houston – was expressly superseded by the May 12 MOA, which was signed in Moscow, and contained the dispute settlement provision that called for arbitration in London under the laws of the United Kingdom.[5]

2. USRT Members Sold Their Interests to USRT Holdings Without Notifying Alenia

According to Petitioner's allegations, in the fall of 1998, Admiral Capra and Siniscalchi told USRT that it had to be entirely owned by Italian citizens before the Italian government would provide any financing. CR 7. Petitioner claims, therefore, that in October 1998, former members of USRT then sold their membership interests in USRT to USRT Holdings, a company wholly owned by

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[5] In connection with the efforts to secure financing for the project from the Italian government, USRT also provided Alenia with a document titled "A Brief History of USRT." SSCR 179. That document explicitly provided that "operations of USRT are directed from USRT's offices in Atlanta, Georgia," and showed that only three of USRT's ten members – with a collective ownership interest of 25.35% – were Texas residents. *Id.* 280-81, 285. The profile also indicated that USRT had no employees and that the working capital for USRT was principally provided by Georgia-based Space Marketing, Inc. *Id.* 282, 285.

Admiral Capra, for a portion of future profits to be earned from the satellites project. *Id.* 7-8. Alenia was not aware of this change in the ownership structure of USRT until October 1999, when Reid sent a letter to Alenia to notify it of the transfer. SSCR 186-87.

Reid nonetheless based his tort theory on the allegation that in May 1999, five months *prior* to that sale, Admiral Capra, Siniscalchi, and Alenia developed a plan to divest USRT of its rights to future profits in the alleged joint venture. CR 8; SSCR 123-24.[6] The sole support for the allegation of this conspiracy is Petitioner Reid's own affidavit, which relies on a triple hearsay account of what Siniscalchi supposedly told him had transpired at the May 1999 meeting in Rome that allegedly regarded the satellites project. SSCR 123-24. Siniscalchi himself did not attend this meeting. *Id.* Giuseppe Viriglio, Vice Chairman and Managing Director of Alenia during the relevant period, who *did* attend the meeting, expressly rejected Petitioner's account in deposition testimony. Pet. App. 9 n.6.

When Alenia ultimately learned from Reid of the suspect transfer of USRT's rights to USRT Holdings in October 1999,[7] by letter dated December 20, 1999, Alenia

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[6] Reid claims that on May 25, 1999, Siniscalchi called him to say that a May 19, 1999 meeting allegedly regarding the satellites project had taken place in Rome between Michael Topolev of InSpace, Viriglio of Alenia, and Admiral Capra, and that Alenia had proposed to issue a lump sum payment and provide consulting contracts to Admiral Capra, Siniscalchi, Reid, and Reed – collectively, the entire ownership and management structure of USRT at the time – in exchange for the transfer of USRT's satellite rights to Alenia. CR 8; SSCR 123-24.

[7] We note that while the Petition alleges that in late 1999, the Italian Companies began implementation of the satellites project without USRT, CR 8, the sole basis for this claim is a press release describing an unrelated project, involving "Yamal" satellites, undertaken by

(Continued on following page)

terminated the May 12, 1998 MOA with USRT consistent with the terms of that agreement. SSCR 171, 186.

B. Alenia's Alleged Contacts Do Not Support General Jurisdiction

Respondents are Italian corporations. They are not currently nor have they ever been qualified, authorized, or licensed to conduct or transact business in Texas. They do not maintain any inventory in the State of Texas; do not have any sales representatives, distributors, brokers or wholesalers within Texas; do not have any bank accounts in the State of Texas; do not have any telephone listings in a public telephone directory in Texas; have not paid taxes or franchise fees in Texas; do not regularly advertise in Texas; and have no authorized agent to accept service of process in Texas. Pet. App. 18-25.

The only "general" contacts that Reid has identified to support general jurisdiction over the Italian companies result from Alenia's work as a subcontractor to various European entities and came at the exclusive direction of those entities pursuant to Alenia's contractual obligations. Alenia had contracts with the Italian Space Agency ("ASI"), as well as with two German companies that, in turn, had contracts with the European Space Agency ("ESA"). SSCR 196-201. ASI and ESA, in turn, had prime contracts with the National Aeronautics and Space Administration ("NASA"), a United States federal agency.

Alenia with Gascom, a completely distinct Russian entity. Pet. 5; SSCR 276. The press release cited by Reid in support of this 1999 project, however, is dated March 15, 2001. Though the Italian companies pointed out this fact in prior briefing to the Texas courts, Reid has not sought to explain these inconsistencies.

Alenia's subcontracts concern the design, manufacture, maintenance, and supply of hardware for the International Space Station. All design and manufacturing work for this hardware is performed at Alenia's manufacturing facilities, which are located exclusively in Italy.

Petitioner does not allege, nor could he, that Alenia's contracts with ASI and ESA required contact with Texas. While the contracts necessarily contemplated testing and support responsibilities relating to the hardware, the locus of those activities was entirely determined by NASA and Alenia in no way participated in that decision: "NASA, rather than the Italian Companies, decided that some of Alenia's services under the contracts with three European entities would be performed at the Space Center." Pet. App. 22. Alenia did not know in advance whether NASA would allocate responsibility for the International Space Station to Johnson Space Center in Texas or to another NASA center in a different state, as NASA had previously done. SSCR 198-99.

REASONS FOR DENYING THE PETITION

None of Petitioner's claimed bases for certiorari supports review by this Court. Reid's leading argument, Pet. 12-18, which suggests that the court of appeals improperly "ignored" conspiracy-related contacts, is not properly before this Court because: (1) Petitioner failed to raise a federal question on this point at any time during the extensive state court proceedings in this case; and (2) the record in this case does not support the existence of a conspiracy or any conspiracy-related contacts that would alter the outcome of the jurisdiction inquiry.

Petitioner's other arguments in support of certiorari rely on misreadings of case law and the opinion below, and are equally without merit. Reid's assertion that the court of appeals improperly examined Alenia's contacts with Texas in "isolation" elevates form over substance and proposes review of a "split" that falls short of this Court's Rule 10 requirements. Pet. 18-24. Similarly, Petitioner's argument that the court of appeals unwisely followed the "minority approach" to evaluate third-party directed contacts rests on his comparison of wholly inapposite cases and his distortion of the opinion below. Pet. 24-29.

Furthermore, and without regard to Petitioner's arguments for certiorari, this Court should deny the petition because the court of appeals judgment rests independently on its unchallenged finding that the exercise of jurisdiction over the Italian Companies would offend the "fair play and substantial justice" requirement of due process. Pet. App. 29. Review of the questions presented by Petitioner would thus amount to a mere advisory opinion in this case. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (explaining that the Supreme Court is "not permitted to render an advisory opinion.").

I. Petitioner's Claims Concerning The Conspiracy Theory of Jurisdiction Do Not Provide an Appropriate Basis To Grant Certiorari

Petitioner asserts that certiorari should be granted in this case to resolve a split of authority concerning how a defendant's alleged conspiracy-related contacts may be considered in the specific jurisdiction inquiry. As Petitioner would have it, review is necessary here because the Texas Supreme Court's holding in *National Industrial Sand Ass'n v. Gibson*, 897 S.W.2d 769 (Tex. 1995) (orig.

proceeding), diverges from the so-called "imputation" and "actual participation" approaches to conspiracy-related contacts that are used by other American courts. It is significant that Petitioner relies on the *Gibson* decision as his *sole basis* for the "minority approach" in *both* of these splits of authority.[8]

A. Petitioner Failed to Properly Present a Federal Question on This Matter in The Texas State Courts as Required by Section 1257(a)

Petitioner's argument for certiorari is fatally flawed because a federal question on this issue was not properly presented in the Texas state courts, as is required by 27 U.S.C. § 1257(a). *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("It is well settled that this Court will not review a final judgment of a state court 'unless the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'") (*quoting Webb v. Webb*, 451 U.S. 493, 496-97 (1981)); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (federal issues may not be raised for the first time on a petition for certiorari).

The requirements of Section 1257(a) are grounded upon important principles of (1) comity between state and

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[8] Petitioner relies on *Gibson* exclusively for one side of his "actual participation" split, and supplements *Gibson* with only two intermediate state court decisions from Washington (1995) and California (1978) for the purported "imputation" split. Pet. 14-15. Pursuant to this Court's Rule 10, the intermediate state court decisions that Petitioner cites as joining the minority approach to the purported "imputation" debate would not suffice to present a split worthy of this Court's certiorari in the absence of *Gibson*. SUP. CT. R. 10.

federal courts; (2) judicial efficiency; (3) deference to the presence of "independent and adequate state grounds that would pretermit the federal issue"; and (4) the need to develop a robust record. *Webb*, 451 U.S. at 500-01. Considerations of comity properly function to allow state courts "an opportunity to consider * * * proposed changes [to state law] that could obviate any challenges to state action in federal court." *Adams v. Robertson*, 520 U.S. 83, 90 (1997). In other words, where possible, state courts should be given a chance to review their decisions before they are challenged as unconstitutional in this Court.

Despite the unequivocal requirements of Section 1257(a), Petitioner has not demonstrated, because he cannot, that he raised a federal question on this point in the Texas court of appeals, or Texas Supreme Court, and, accordingly, cannot show that Texas courts addressed or ruled on such a federal question. Moreover, despite the requirement of Rule 14(g)(i) of this Court that a petition for certiorari must specify from the record of the state court proceedings when and how the federal question was raised in briefing below, *see* SUP. CT. R. 14(g)(i), Reid has made no effort, again because the record is devoid of any such references, to identify any prior discussion of this purported federal question in the briefing of this case.

The record in this case reveals that through three rounds of briefing to the Texas Supreme Court, conducted over a twenty-month period and including six submissions by Reid spanning 111 pages, Reid was entirely silent on the "conspiracy-related contacts" issue he embraces as a basis for review here. None of these briefs even mentions *Gibson*, the very Texas Supreme Court case that Petitioner now urges this Court to reverse, and none of the "Issues Presented" in Reid's Petition for Review or in his Brief on

the Merits to the Texas Supreme Court even remotely touches a "conspiracy-related contacts" question. Pet. S.C. Br. xi. Petitioner thus attempts here to both call *Gibson* into question and to rely on *Gibson* as the sole arguable basis for this split of authority, even though he neglected several opportunities to ask the Texas Supreme Court to revisit, reconsider, or clarify its decision in that case.

Reid similarly failed to make any argument at all concerning *Gibson* or imputation of co-conspirator contacts in the jurisdiction inquiry during extensive briefing to the court of appeals, including a Motion for Rehearing En Banc to that court.[9] Reid's only reference to a "conspiracy-related contacts" issue in that forum was a lone citation to a Texas appellate decision, *General Elec. Co. v. Brown & Ross Int'l Distribs., Inc.*, 804 S.W.2d 527 (Tex. App. – Houston [1st Dist.] 1990, writ denied), for the general proposition that a "defendant who participates in a conspiracy known to impact Texas has satisfied [the] requirements for specific jurisdiction." Pet. C.A. Br. 26. Reid's one-line reference to *General Electric* cannot be seen as raising a substantial federal question under Section 1257(a). *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1980) (a federal question must be presented in the state courts with "fair precision and in due time."); *see also Webb*, 451 U.S. at 501 (the record must show that "[state] courts were apprised of the nature or

[9] Indeed, the only reference to the imputation issue in the entire briefing of this case came from Alenia, which in its appellant brief to the court of appeals cited *Gibson* in a two-sentence footnote to show that the contacts of other defendants could not be imputed to Alenia for the purposes of "minimum contacts."

substance of th[illegible]deral claim at the time and in the manner required by state law.").

Reid did not raise any federal question as to "conspiracy-related contacts" in the Texas courts, and no related federal question was addressed by the Texas courts in this case.[10] Principles of federalism safeguarded by Section 1257(a) dictate that, under such circumstances, Petitioner may not now manufacture a federal question for this Court to review.

B. No Federal Question Concerning Conspiracy-Related Contacts Is Presented by This Case

Even if Petitioner had properly presented a federal question for purposes of Section 1257(a), this case does not present the opportunity to resolve any hypothetical dispute over alleged conspiracy-related jurisdictional contacts. Petitioner asserts that a conspiracy theory of jurisdiction is "implicated" here because Alenia purportedly conspired with Italian citizen Admiral Capra and Illinois citizen Siniscalchi. Pet. 16. But Petitioner must provide more than a bare allegation of conspiracy to support this type of argument. *See Stauffacher v. Bennett*, 969 F.2d 455, 460 (7th Cir.), *cert. denied*, 506 U.S. 1034 (1992) ("The cases

[10] Nor can a federal issue be said to have been "drawn in question" or "specifically set up" for the purposes of Section 1257(a) merely through the Texas court of appeals' observation of *Gibson*'s holding in a single parenthetical of its lengthy opinion. Pet. App. 15-16. Pursuant to the requirements of Section 1257(a), the federal question must be "drawn in question in a manner *directly bearing on the merits of the action*." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975) (emphasis added).

are unanimous that a bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough.").

Moreover, the Texas court of appeals explicitly rejected the existence of a conspiracy in this case, explaining that "the only evidence that might arguably relate to such a conspiracy is Reid's description of a phone call from Siniscalchi in which Siniscalchi allegedly described discussions in Rome." Pet. App. 15. That lone description was contained in Reid's own affidavit and is a triple hearsay account of what Reid claims Siniscalchi told him about a meeting that Siniscalchi did not even attend. SSCR 123-24. Thus, even operating under a broad presumption in favor of Petitioner's allegations, the court of appeals found no evidence of a conspiracy involving Alenia.[11]

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[11] Petitioner asks this Court to consider instead four "underlying facts [that] provide circumstantial evidence that these parties conspired to remove USRT from the joint venture." Pet. 16. But the "underlying facts" cited by Petitioner are either directly contradicted by the opinion below, entirely unsupported by the record, or irrelevant to any allegation of conspiracy. Petitioner refers first to what he calls the "coerced sale of USRT," Pet. 16, namely the sale of USRT to USRT Holdings, a Delaware corporation, for $300 million. The record evidence is that Alenia was never aware of any pending change in the ownership structure of USRT, and was not informed of the sale until a year after it occurred, when Reid sent a letter to Alenia indicating the change. SSCR 186-87. Petitioner next cites what he calls "Alenia's proposed bribe," which was to be presented to USRT by Jon Reed, and asserts that the court of appeals "agreed [that it] provided arguable evidence of a conspiracy." Pet. 16 (citing Pet. App. 4, 15). Far from agreeing that this represented "arguable evidence," however, the court of appeals stated plainly that "there is no evidence that Alenia ever directed Reed to do this." *Reid*, 130 S.W.3d at 215. Petitioner also refers to "the termination of those managers who would not go along." Pet. 16. That termination, the record makes clear, came nine months after the sale of USRT to Delaware-based USRT Holdings, five months after the resignation of a

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Further, even if Petitioner had properly established the existence of such a conspiracy, the alleged co-conspirator contacts that impute to Alenia would in no way alter the jurisdictional calculus. As Petitioner acknowledges, *see* Pet. 17 n.8, the only potential contact the court of appeals identified was the alleged phone call from Siniscalchi to Reid, and "the record does not indicate where Reid or Siniscalchi were located during this phone call." Pet. App. 15 n.11. The only potential contact that could be imputed, then, is one phone call that may or may not have been made to Texas.[12]

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key member of the USRT management team, and was entirely the doing of USRT Holdings, not Alenia. Finally, Petitioner cites Alenia's "subsequent launch of a satellite without USRT." Pet. 16. In fact, the only record evidence relating to any purported satellite launches was a press release describing an unrelated project undertaken by Alenia with Gascom, a completely distinct Russian entity. SSCR 276.

[12] Reid also suggests that the Texas court of appeals improperly discounted Alenia's participation in an alleged conspiracy because Texas courts, following *Gibson*, do not recognize the "actual participation" theory of jurisdiction. Pet. 16-17. We note, however, that *Gibson* merely held that "plaintiffs' bare allegations of conspiracy *lacking any evidence of conspiratorial acts in or directed to Texas*" could not provide the "basis on which to assert specific jurisdiction." 897 S.W.2d at 776 (emphasis added). *Gibson* thus plainly contemplated that a defendant's individual acts *directed toward Texas* as part of a conspiracy, if properly supported by record evidence, could be used to establish specific jurisdiction. There is no division over such a principle of law, as it represents precisely the sort of analysis that courts routinely engage in under *Calder v. Jones*. 465 U.S. 783, 789-90 (1984). In other words, if a defendant takes action designed to intentionally cause harm in a forum state, such actions may be considered in the jurisdictional inquiry under the rubric of *Calder*, whether additional conspiracy claims are present or not.

II. There Is No Division Among Courts Concerning The Purported "Collective" and "In Isolation" Approaches To Minimum Contacts

Petitioner also presents as a basis for certiorari his argument that a split of authority exists over whether courts should evaluate jurisdictional contacts "collectively" or "in isolation." Pet. 18-19. As an initial matter, and as Alenia repeatedly pointed out to the Texas courts, Alenia S.C. Br. viii & n.2, there is simply no division of authority among American courts concerning this facet of the "minimum contacts" analysis. It is well-settled law that contacts are evaluated "collectively," rather than "individually." *See, e.g., Mid-America Tablewares v. Mogi Trading Co.*, 100 F.3d 1353, 1361 (7th Cir. 1996) (noting that by discussing contacts "in isolation and suggesting that none alone establishes the requisite minimum contacts, [defendant] fails to appreciate that the minimum contacts inquiry is one that examines the totality of the circumstances."); *Northrup King Co. v. Compañía Productora Semillas Algodoneras Selectas S.A.*, 51 F.3d 1383, 1388 (8th Cir. 1995) ("In determining whether there is personal jurisdiction, the courts consider the defendant's contacts with the forum in the aggregate, not individually; they look at the totality of the circumstances."). An examination of the *Reid* opinion reveals that the Texas court of appeals properly followed this methodology and held that "[o]n this record, we conclude that the Italian Companies' very limited contacts with Texas relating to the subject matter of this lawsuit are insufficient to support the existence of specific jurisdiction." Pet. App. 17-18.[13]

[13] Though the court of appeals did analyze the alleged contacts seriatim in discrete sections of its opinion, as is the sound practice of

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Petitioner's assertion that certain Texas state courts have adopted the "isolation" approach to minimum contacts rests entirely on mischaracterizations of the cases he cites. None of these courts indicates that it is adopting an "isolation" approach or deviating at all from the settled "collective" approach. Instead, after considering the relevant contacts taken together (which is precisely what is required by the "collective approach"), they merely declined to find personal jurisdiction. *See Shell Compañia Arg. de Petroleo, S.A. v. Reef Exploration, Inc.*, 84 S.W.3d 830, 838-40 (Tex. App. – Houston [1st Dist.] 2002, pet. denied) ("Although these contacts are related to some Texas entities, they are too attenuated to constitute 'minimum contacts' * * * Such fortuitous contacts made pursuant to the closing of a transaction do not meet the minimum contacts analysis.") (internal citations omitted); *Televentures, Inc. v. Int'l Game Tech.*, 12 S.W.3d 900, 912 (Tex. App. – Austin 2000, pet. denied) ("IGT's Texas contacts were incidental and immaterial to the purpose of the contract * * * and were not instigated by IGT."); *Magnolia Gas Co. v. Knight Equip. & Mfg. Corp.*, 994 S.W.2d 684, 692 (Tex. App. – San Antonio 1998, no pet.) ("The Texas contacts were entirely incidental and immaterial to the purpose of the contract and were not instigated by Magnolia and MKP, or their assignor.").

Reid's objections take aim at the form of the opinions themselves and the fact that the cited Texas courts discussed the relevant contacts either in discrete sections of their opinions or seriatim. *See, e.g., Reef Exploration*, 84

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countless other courts, *see, e.g., Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 416-18 (1984), the underlying legal standard – the "collective" approach – used by the court was correct.

S.W.3d at 837-40 (discussing the purported contacts in discrete labeled sections of the opinion); *TeleVentures*, 12 S.W.3d at 908-12 (same); *Magnolia Gas*, 994 S.W.2d at 691-692 (discussing the contacts seriatim). Such a stylistic complaint elevates form over substance and does not signal a division of authority.

Moreover, as noted above, the "collective" approach to evaluating a defendant's contacts with a forum is the established mode of analysis. Accordingly, even if Reid is correct that the cases he cites in fact apply an "isolation" approach, those cases do not amount to a division of authority on this issue, but rather discrete instances of misapplication of settled law. This Court, however, is not the proper venue to pursue such claims of error. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law.").

Putting aside the substance of the cases Petitioner cites for this split of authority, Petitioner's argument fails independently because those cases do not satisfy this Court's Rule 10 requirements. *See* SUP. CT. R. 10. Petitioner correctly identifies five United States Courts of Appeals as falling on the "collective" side of the purported division, Pet. 18-20, yet points to only three *intermediate Texas appellate courts* as taking the so-called "isolation" position. Pet. 20-22. Pursuant to the rules of this Court, certiorari would only be appropriate here if the federal circuit decisions conflicted with at least one decision of another federal circuit court or of a state court of last resort. *See* SUP. CT. R. 10(a) (noting that a writ of certiorari is appropriate when "a United States court of appeals has entered a decision in conflict with the decision of

another United States court of appeals * * * [or] a state court of last resort * * * ").

III. Petitioner Does Not Identify, and This Case Does Not Implicate, a Split Regarding "Third-Party Directed" Contacts

Petitioner's final argument for certiorari fails because the general jurisdiction inquiry performed in this case does not implicate any unresolved federal constitutional question of due process. In his attempt to persuade the Court that this case presents an open legal issue concerning general jurisdiction, Reid asserts that the Texas court of appeals "did not deny that Alenia's contacts were continuous and systematic, but held that they should be ignored because a third party, rather than Alenia, had chosen Texas as the site for the services Alenia had agreed to perform under its service contracts." Pet. 24-25.

Petitioner's assertion, however, is contradicted by the court of appeals' conclusion that "[a]fter carefully analyzing the nature and quality of the Italian Companies' contacts with Texas, we find no continuous and systematic general business contacts with Texas." Pet. App. 25. Moreover, the court of appeals did not "ignore" any contacts, as Petitioner would have it; rather, it held that the fact that Alenia's contacts with Texas came at the direction of NASA and the European space agencies "significantly diminishe[d] the quality of these contacts and does not indicate that [Alenia] purposefully directed their business activity at Texas." Pet. App. 22.

Petitioner's claim that the court of appeals' approach to general jurisdiction "has been rejected by five circuits" and implicates a "longstanding" split of authority in fact

relies on cases that do not remotely touch on the legal issue or the set of facts considered by the court of appeals. The record in this case is that Alenia's general contacts with Texas result solely from Alenia's subcontracts with European entities – who in turn had prime contracts with NASA, a United States federal agency – concerning Alenia's supply of hardware for the International Space Station. Pet. App. 18-22. The location of these services was unilaterally determined by NASA, and there is no evidence that Alenia controlled or participated in this decision. SSCR 198-99. Alenia did not know in advance whether NASA would allocate responsibility for the International Space Station to Johnson Space Center in Texas or to another NASA center in a different state, as NASA had previously done. Pet. App. 22.

None of the relevant portions of the circuit decisions cited by Reid deals with a nonresident defendant whose general jurisdiction contacts came entirely at the direction of a third party, pursuant to contractual obligations to that party. In fact, these cases do not even address *general jurisdiction* at all. Petitioner's citations stand for the uncontroversial principle of *specific jurisdiction* law that defendants who knowingly and voluntarily engage in commercial activity in the forum may not avoid suit in the forum that arises out of that activity.[14] Petitioner's attempt

[14] In *Trinity Industries, Inc. v. Myers & Associates, Ltd.*, 41 F.3d 229, 231 (5th Cir.), *cert. denied*, 516 U.S. 807 (1995), the Fifth Circuit found specific jurisdiction to be present where the nonresident law firm defendant "voluntarily assumed and continued the obligation of representing a Texas client." Similarly, in *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 700-01 (3d Cir. 1990), an out-of-state manufacturer voluntarily traveled to the forum to deliver and repair a boat and therefore was found subject to specific jurisdiction in the forum. In *Madison Consulting Group v. State of South Carolina*, 752 F.2d 1193,

(Continued on following page)

to create the illusion of a split by juxtaposing these inapposite cases is unavailing.

IV. The Court of Appeals' Fair Play Analysis Is an Independent and Alternative Grounds for That Court's Ruling

A. Any Exercise of Jurisdiction Under The Texas Long Arm Statute Must Comport With Traditional Notions of Fair Play and Substantial Justice

Consistent with Texas law and well-established Supreme Court precedent, the court of appeals held, "[a]fter considering all applicable factors and interests,"

1202 (7th Cir. 1985), nonresident defendants were subject to jurisdiction in Wisconsin where they actively solicited the plaintiff consulting company's services in Wisconsin and contracted for those services with the knowledge that they would be mostly performed in that state. In *Myers v. John Deere, Ltd.*, 683 F.2d 270, 271 (8th Cir. 1982), a Canadian defendant shipped products by train through North Dakota, where the cargo collapsed and injured a customs inspector. In finding that the nonresident defendant was subject to specific jurisdiction, the court stressed that defendant's forum contacts did not arise from the "unilateral activity" of another because defendant took "affirmative acts to effect delivery" of its products to the U.S., made numerous shipments to the U.S., and "knew that such shipments would go through North Dakota." *Id.* at 272. In *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 128 (2d Cir. 2002), the Second Circuit found specific jurisdiction was properly grounded over the non-resident defendant and observed that the defendant law firm "seeks to be known in the New York legal market, makes efforts to promote and maintain a client base there, and profits substantially therefrom." The court determined, accordingly, that there was nothing "fundamentally unfair about requiring the firm to defend itself in the New York courts when a dispute arises from its representation of a New York client – a representation which developed in a market it had deliberately cultivated and which, after all, the firm voluntarily undertook." *Id.* at 128-29.

"that the exercise of personal jurisdiction by a Texas court over the Italian companies would be unreasonable and would offend traditional notions of fair play and substantial justice." Pet. App. 29. Accordingly, certiorari of the court of appeals' decision should be denied because that judgment represents an independent and alternative ground for Texas' refusal to exercise personal jurisdiction over the Italian Companies in this case.[15]

The "fair play" requirement is an independent element of the due process inquiry and an alternative grounds for a court's denial of personal jurisdiction. *See, e.g.*, *Schlobohm v. Schapiro*, 794 S.W.2d 355, 358 (Tex. 1990) ("Courts must consider the fair play analysis * * * because the case law makes clear that this analysis is separate and distinct from the minimum contacts issue."); *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1029 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998) ("Even assuming that [defendant] had the necessary minimum contacts with [the forum state], we believe that the exercise of personal jurisdiction in this case would not comport with our traditional conception of fair play and substantial justice.") (internal quotation omitted); *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994) (explaining that the "'fairness' prong of the jurisdictional

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[15] Texas courts, interpreting the Texas long-arm statute, have explained that "fair play and substantial justice" is a requirement of due process. *See, e.g.*, *BMC Software Belgium v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) ("Personal jurisdiction over nonresident defendants is constitutional when two conditions are met: (1) [minimum contacts], and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice."); *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990) (identifying fair play and substantial justice as the third part of the "Texas formula").

inquiry" is a constitutional requirement); *Denmark v. Tzimas*, 871 F. Supp. 261, 269 (E.D. La. 1994), *aff'd*, 78 F.3d 582 (5th Cir. 1996) (dismissing claim for lack of personal jurisdiction where "although the defendant has the requisite minimum contacts * * * plaintiff's claim in this forum fails to satisfy the fundamental fairness requirements of due process").

Petitioner attempts to avoid this determinative element of the court of appeals opinion, suggesting in a footnote that "fair play" analysis necessarily depends on how the minimum contacts question is resolved, and that "fair play" is therefore not an independent basis for the court of appeals' ruling. Pet. 8-9 n.3. Petitioner's citation to *Asahi Metal Industries Company v. Superior Court of California*, 480 U.S. 102 (1987), in support of this contention is misplaced. In *Asahi*, while this Court was divided on the issue of minimum contacts, an eight-Justice majority held that the exercise of personal jurisdiction over the defendant would not comport with traditional conceptions of fair play and substantial justice, *"even apart from"* minimum contacts analysis, and reversed the lower court's finding of jurisdiction. *Asahi*, 480 U.S. at 113-16 (emphasis added). The *Asahi* Court did not regard settlement of the minimum contacts question as a threshold matter.[16]

Petitioner also cites the following dicta in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985): "[W]here a defendant who purposefully has directed his activities at

[16] As Mr. Justice Stevens put it: "An examination of minimum contacts is not always necessary * * * California's exercise of jurisdiction over Asahi in this case would be 'unreasonable and unfair.' *This finding alone requires reversal.*" *Id.* at 121 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added).

forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477. But Petitioner ignores *Burger King*'s further admonition that "the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction, *even if the defendant has purposefully engaged in forum activities.*" *Id.* at 477-78 (internal quotation marks omitted) (emphasis added). Fair play and substantial justice is thus an independent requirement that must be satisfied, and it is neither subsumed by nor contained in minimum contacts analysis.

B. The Factual Findings of The Court of Appeals, as well as The Record in This Case, Make Clear That Jurisdiction Over Alenia in Texas Would Offend Fair Play and Substantial Justice

In conducting the fairness inquiry, pursuant to *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 228 (Tex. 1991) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), the court of appeals made a series of findings. First, it recognized that "[a]llowing the suit to proceed in Texas would be expensive and burdensome for the Italian Companies," Pet. App. 27, and would "force them to defend against Reid's claims in a foreign legal system." *Id.*; *see Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight."). Second, and "[m]ost significantly," the court of appeals held that "the interests of Texas in adjudicating this dispute are minimal." *Id.* ("Because this dispute does not involve any Texas entity

and cannot result in a judgment in favor of any Texas entity, we conclude that Texas's minimal interest in this dispute strongly militates against the assertion of jurisdiction in this case."). Third, the court of appeals observed this Court's admonition in *Asahi* that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." 480 U.S. at 115. Noting that Finmeccanica, S.p.A. is "an Italian company in which Italian government entities own a 34% interest," Pet. App. 28, the court of appeals properly recognized that exercising jurisdiction would "raise important concerns regarding the substantive policies of Italy and Russia and * * * the United States government's foreign-relations policies vis-à-vis these countries." *Id.* Finally, the court noted that enforcing any judgment from a Texas court will require that Reid "convince the appropriate decision-makers in the Italian judicial system that, under Italian law, he is entitled to enforce a valid Texas judgment." Pet. App. 28-29. Where the lower court's holding and the record itself disclose such a well-supported independent ground for the decision below, this Court should not grant certiorari.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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No. 05-1586

In the Supreme Court of the United States

DENNIS A. REID,

Petitioner,

v.

ALENIA SPAZIO, S.P.A. AND FINMECCANICA, S.P.A.,

Respondents.

On Petition for a Writ of Certiorari to the Fourteenth Court of Appeals of Texas

REPLY BRIEF FOR PETITIONER

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Alenia's brief in opposition raises a variety of factual and legal arguments. As explained below, however, none has merit and the petition should be granted.

A. Alenia's factual claims raise issues that have already been decided against it as a matter of state law.

In the trial court, Alenia filed a special appearance, which was denied. App. 1. Under state law, that denial meant that all facts supporting the trial court's ruling were found in petitioner's favor if supported by some evidence. App. 6. As relevant here, the primary facts supporting specific jurisdiction were that that Alenia had formed a joint venture with USRT; that USRT had been a Texas-based business through August 1999; that Alenia had cultivated its relationship with USRT by in-forum negotiations, forum-directed communications, and a loan of operating funds; that Alenia had developed a plan to bribe USRT's management in May 1999 as part of a larger plan to oust USRT from the venture; and that Alenia had further breached its fiduciary duties to USRT by launching a satellite without USRT in late 1999 before purportedly canceling any joint venture agreement between the parties. Pet. 2-5.

On appeal, Alenia disputed the evidentiary sufficiency of the findings supporting the trial court's judgment. App. 6-7 & n.4, but the court of appeals did not find that any of the above facts were unsupported by sufficient evidence under state law. Most notably, the court of appeals did not overturn the trial court's finding that Alenia was part of a conspiracy to oust USRT from the joint venture, which is unsurprising given petitioner's direct evidence of this fact based on statements of Siniscalchi himself. Alenia continues (at 6, 14) to describe this evidence as hearsay, but statements of party opponents and co-conspirators are not hearsay under either state or federal law, see TEX. R. EVID. 801(e)(2); FED. R. EVID. 802(d)(2), and the court of appeals did not hold otherwise.

The court of appeals did decide that USRT lacked any Texas operations after August 1999, App. 11-12, and that there was no evidence that Alenia *itself* offered a bribe to USRT's president Jon Reed. App. 16, but petitioner does not

dispute those determinations. Rather, as previously discussed, Pet. 17-18, and further discussed below, *infra* B.1.c, they merely reveal the outcome determinative nature of the court of appeals' initial refusal to give any jurisdictional significance to Alenia's participation in the underlying conspiracy.

Because Alenia failed on state law grounds to overturn the primary trial court findings favoring petitioner, those findings are final and Alenia cannot re-litigate them here, as it seeks to do throughout its brief. Moreover, because those fact issues cannot be re-litigated here, this case presents an ideal vehicle for reviewing the relevant personal jurisdiction issues the court of appeals actually decided, which include several unresolved issues of federal law as discussed below.

B. Alenia's legal arguments in opposition to the petition lack merit.

1. Petitioner's conspiracy issues are preserved, implicate two splits of authority, and are outcome determinative on the merits.

a. ***Preservation.*** Alenia does not dispute that Texas law extends state court jurisdiction to the limits of federal due process, see *Coleman*, 83 S.W.3d at 806, or that the overarching question presented (whether Texas may assert personal jurisdiction over Alenia in this litigation) poses a substantial federal question. Alenia also does not dispute that this federal question was raised and decided in the trial court and court of appeals or that petitioner challenged the court of appeals' negative resolution of that question through a petition for review with the Supreme Court of Texas. Rather, what Alenia claims (at 10-13) is that one subpart of this question – whether courts may ignore a defendant's imputed or actual participation in a conspiracy to harm a forum business – is not properly before this Court because it was not raised in the two lower appellate courts. Alenia's contention is mistaken for the following reasons.

As a threshold matter, Alenia conflates the relevant federal claim (that Texas may assert personal jurisdiction over Alenia) with one of several arguments that can be made in support of it

(that Alenia was involved in a conspiracy to harm a Texas business). As a procedural matter, this distinction makes a difference because a litigant who has raised a federal claim in state court is not limited in this Court to arguments previously made in support of it. See *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983) (quoting rule from *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899), that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" if the new arguments are so connected to the same federal question as to "form but another ground or reason for alleging the invalidity of the [lower court's] judgment"). That said, there are prudential reasons for this Court to prefer cases where both the federal claim and relevant arguments were presented below. As next explained, however, that prudential concern is met here as well.

Because the Supreme Court of Texas denied discretionary review in this case, the judgment under review is that of the court of appeals. See 28 U.S.C. § 1257(a); *American R. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923). In that court, Alenia claimed on appeal that Texas could not assert specific jurisdiction over it under federal due process standards. Br. of Appellants 15-16, 17-26. In opposition, petitioner argued that Alenia was subject to personal jurisdiction because, among other reasons, it had "conspir[ed] to usurp the joint venture partnership's business opportunities." Br. of Appellee 26. In deciding the overarching federal claim, the court of appeals held that it could not give jurisdictional significance to Alenia's imputed participation in such a conspiracy based on *Nat'l Industrial Sand Ass'n* v. *Gibson*, 897 S.W.2d 769 (Tex. 1995) (orig. proceeding), App. 15-16, a decision resolved on federal due process grounds. The court of appeals further held that it could not give jurisdictional significance to Alenia's actual participation in a conspiracy and claimed (at App. 16 n.12) that its resolution of that issue was consistent with *Calder* v. *Jones*, 465 U.S. 783 (1984), also decided on federal due process grounds.[1] Thus, even if one focuses on

[1] More generally, since Texas law extends the jurisdiction of state courts to the limits of federal due process, every personal jurisdic-

the arguments made in support of petitioner's federal claim, it is clear that the court of appeals rejected the conspiracy argument on federal grounds, and when a federal issue was decided by the court whose judgment is under review, this Court presumes it was properly presented. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 185 (8th ed. 2002).[2]

Alenia states (at 11-12) that petitioner did not raise any conspiracy-related issues when seeking discretionary review in the Supreme Court of Texas. That is true, but it provides no procedural or prudential basis for denying review. As a procedural matter, there is no dispute that petitioner asked the Supreme Court of Texas to review the court of appeals' resolution of his federal claim that Texas may assert jurisdiction over Alenia. As a prudential matter, even if petitioner's federal claim were narrowly defined solely in terms of the conspiracy issues, it would have been futile to ask the Supreme Court of Texas to review those issues given the statutory limits on that court's discretionary jurisdiction. Specifically, given *National Industrial Sand*'s controlling status in Texas, petitioner could have obtained discretionary review of the conspiracy issues only by convincing the Supreme Court of Texas to reconsider *National Industrial Sand* as a question of "importance to the jurisprudence of the state." TEX. GOV'T CODE ANN. 22.001(6). Yet as Alenia itself explained in successfully opposing petitioner's petition for discretionary review, the "importance to the jurisprudence of the state" basis for discretionary review was unavailable to petitioner because Alenia had taken an interlocutory appeal on the under-

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tion issue before the court of appeals was decided under federal law apart from questions of evidentiary sufficiency, which, as discussed above, were decided on state law bases that Alenia no longer can challenge, although it tries to do so.

[2] See also *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914) (stating the "elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided"); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Charleston Federal Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 186 (1945).

lying jurisdictional question, which made the judgment of the court of appeals final by statute. Alenia's Resp. to Pet. for Rev. at iv, 3. Consequently, there was no basis for petitioner to file a petition seeking review of the conspiracy issues given the limited statutory jurisdiction of the Supreme Court of Texas. See *Nash* v. *Florida Indus. Com.*, 389 U.S. 235, 238 n.1 (1967) (treating lower state court decision as relevant decision under § 1257, even when higher state court review was not sought, when state supreme court indicated it lacked appellate jurisdiction for the type of case in question). For these reasons, petitioner's conspiracy issues are properly before this Court, both procedurally and prudentially.

b. ***Significance***. Alenia does not dispute that a long-standing conflict exists on the imputation issue, nor does it defend the fact that Texas has adopted the minority view that federal due process precludes the imputation to Alenia of the actions of its co-conspirators even though substantive law would impose liability on it for those same actions.

On the actual participation issue, Alenia claims (at 15 n.12) that no conflict exists because *National Industrial Sand* did not hold that actual participation in a conspiracy cannot form a basis for jurisdiction. But in that case, the Supreme Court of Texas expressly announced the following standard: "[W]e decline to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state." 897 S.W.2d at 773. To be sure, that case was easy for that court to resolve under the announced standard because the plaintiff lacked proof that the defendant had been part of such a conspiracy. But the ease with which the court decided the case does not change the standard it announced, and the same standard was applied by the court of appeals here when it held that a defendant's actual participation in a conspiracy to harm a forum resident did not suffice to establish specific jurisdiction.[3]

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[3] Alenia otherwise argues (at 10 n.8) that the conflict of authority on this issue is not as deep as it appears because the two decisions

c. ***Merit.*** As explained above, Alenia's brief re-argues many of the same challenges to the trial court's factual findings that Alenia unsuccessfully raised in the court of appeals. In particular, Alenia argues (at 13-15) that there was no evidence of its actual or imputed participation in a conspiracy to oust USRT from the parties' joint venture. In so arguing, Alenia stresses (at 13-14) that mere allegations should not suffice to prove a conspiracy. Petitioner agrees and reiterates that the court of appeals did not reject his claims because they were based on a lack evidence; it rejected them because it decided that Alenia's actual or imputed participation in the conspiracy was legally irrelevant. As a result, it erroneously gave no weight to petitioner's evidence that Alenia directly was involved in a plan to bribe USRT's management (actual participation) and indirectly was involved when that bribe was offered to petitioner and Jon Reed via Alenia's co-conspirators (imputed participation).[4]

Alenia claims (at 15) that the imputation of its co-conspirator contacts would not advance petitioner's case because the court of appeals discussed only one potential "in Texas" contact that might be imputed, a phone call between Siniscalchi and petitioner. But as previously explained, impu-

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that agree with *National Industrial Sand* were intermediate court decisions from other states. But this Court considers such decisions when deciding to address conflicts of authority. See *Beach* v. *Ocwen Fed. Bank*, 523 U.S. 410, 415 n.5 (1998). Conversely, if those other cases were not counted, it would simply suggest that Texas's position is even more of an outlier than it already appears, further suggesting that review by this Court is warranted.

[4] Alenia also claims (at 6-7 & n.7) there was no evidence that it breached its fiduciary duties in 1999 by launching a satellite before purportedly canceling any joint venture agreement. In so arguing, Alenia stresses a document concerning its activities in 2001. *Ibid.* (citing SCR 276). While that document reflects Alenia's further involvement in satellite activities, petitioner did not rely on it to show that Alenia launched a satellite in 1999. That fact was separately shown by affidavit evidence that Alenia never successfully challenged in either lower court. Pet. 5 (citing SCR 125).

tation would not simply impute to Alenia the "in Texas" contacts of its co-conspirators (which admittedly may be few) but also all of their "Texas directed" contacts, such as the coerced sale of USRT and the termination of USRT's loyal management. Pet. 16. Nor is it surprising that the court of appeals failed to discuss such contacts, given its holding that an individual's forum-directed participation in a conspiracy was irrelevant to the jurisdictional inquiry.

In sum, the court of appeals decided that Alenia's actual and imputed participation in a conspiracy to harm a forum business was jurisdictionally irrelevant under federal law, and the Supreme Court of Texas lacked statutory jurisdiction to grant review based on such issues as Alenia's briefing to that court itself explained. Because these issues implicate two longstanding splits of authority, this Court should grant the petition. Alternatively, if this Court decides to address these issues in another pending case, see Pet. 14 & n.5, 29-30 (noting *Mackey* v. *Compass Mktg., Inc.*, No. 05-1433), it should hold this petition pending the resolution of that case.

2. *Whether courts must collectively weigh a defendant's contacts implicates a longstanding split of authority.*

Alenia agrees (at 16) that courts must collectively weigh a defendant's contacts but denies (at 18) that any conflict exists on this because the minority-view cases petitioner cited were intermediate state court decisions. As noted above, *supra* note 3, this Court counts such decisions when considering conflicts. Further, in two of the cited cases (*TeleVentures* and *Shell Compañia Argentina de Petroleo*), the Supreme Court of Texas denied review as it did here, see Pet. 9, 21, 22, thus making those decisions ones from the highest state court in which a decision could be had. 28 U.S.C. § 1257(a). Finally, even if the posture of those decisions meant they do not establish a technical conflict, they still demonstrate the unresolved status of an important federal issue, which also provides a basis for review as well. See SUP. CT. R. 10(c).

Alenia otherwise claims (at 16 n.13, 17) that these courts of appeals applied the correct "collective" standard. But none

purported to apply such a standard and Alenia's only "proof" to the contrary is that, in each case, the plural term "contacts" appeared somewhere in the court's conclusion that the relevant defendant's "contacts" did not support jurisdiction. *Id.* at 17. As previously shown, however, the actual analysis employed by each of those courts was the same as applied by the court of appeals here, which examined Alenia's Texas contacts in isolation from each other and the litigation as a whole. Pet. 20-23. To say a court can cure such a flawed analysis by using the word "contacts" in its conclusion elevates form over substance.

Alenia finally argues (at 18) that even if these decisions are wrong, they just evidence isolated errors on an established legal principle. But the only cases Alenia cites (at 16) for the proposition that collective analysis is "established" are cases from lower federal courts. Thus, even if such analysis finds support in this Court's precedents, it is not clearly "established," especially given the contrary view that has been repeatedly invoked by Texas courts to dismiss claims against nonresident defendants under the guise of federal due process restrictions. Moreover, given the Supreme Court of Texas's repeated denials of review in such cases, this conflict of authority warrants final resolution by this Court.

3. Whether a defendant may characterize its voluntarily in-state business as the "unilateral activity" of another implicates a longstanding split of authority.

Alenia claims (at 20-21 & n.14) that there is no conflict on the unilateral activity issue because the cases that properly apply the principle have done so in deciding specific jurisdiction questions while the cases that improperly apply it have done so in deciding general jurisdiction questions. That is true but irrelevant to the existence of a conflict because regardless of whether a court is conducting a general or specific jurisdiction analysis, the court's threshold task is the same: determining the universe of relevant forum contacts. And it is during this task common to both types of jurisdiction that the unilateral activity principle is employed. Alenia offers no authority suggesting that the principle should apply

differently based on the type of jurisdiction asserted, and this Court has applied the principle uniformly in both. See *Helicopteros Nacionales de Colombia*, 66 U.S. at 417 (general jurisdiction); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980) (specific jurisdiction).

Alenia otherwise argues (at 19) that the court of appeals did not wholly ignore Alenia's Texas contacts under its third-party agreements but merely viewed them as "substantially diminished" in relevance. In fact, this "substantially diminished" treatment amounted to zero weight given the court's conclusion that Alenia lacked sufficient contacts for general jurisdiction even though its in-forum and forum-directed business contacts were undeniably continuous and systematic throughout the period in question. Pet. 5-6. Alenia also insinuates (at 8, 20) that it did not know in advance that it would have to perform work in Texas before it entered the relevant agreements, but the court of appeals held that it did, App. 22, and as with Alenia's other factual disputes, that determination cannot be re-litigated here.

Because the court of appeals' decision implicates the minority view of another longstanding conflict of authority on this jurisdictional issue, this Court should grant the petition.

4. The court of appeals' resolution of the "fair play" issue does not independently support its judgment because a correct resolution of that issue depends on a correct resolution of the minimum contacts issue.

Alenia argues (at 9, 23 & n.16) that the fair play analysis is independent of the minimum contacts analysis, but its authority is a concurrence in *Asahi* that six Justices did not join. Further, that concurrence suggests only that the fair play question sometimes can be answered without a minimum contacts analysis. In cases like *Asahi*, where neither party had ever had a business presence in the forum, that makes sense. See 480 U.S. at 116 (Brennan, J., concurring in part and concurring in the judgment) ("This is one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" ' . . . defeat the reasonable-

ness of jurisdiction even [though] the defendant has purposefully engaged in forum activities." (quoting *Burger King*, 471 U.S. at 477-478)). Here, however, USRT was a Texas business implementing an innovative business plan conceived and developed by Texans in Texas, while Alenia, a foreign business, conducted substantial work in Texas under lucrative third party contracts. As next explained, these facts demonstrate why the fair play analysis here depends on a correct resolution of the minimum contacts issue.

As Alenia acknowledges (at 24), USRT's lack of a current Texas presence was a primary fact motivating the court of appeals' fair play decision. By relying on that fact, however, the court of appeals erroneously gave no weight to Texas's interest in protecting an entrepreneurial business from a foreign conspiracy whose object was to usurp that business's innovative business plan and eliminate its Texas presence, and this error flowed inexorably from the court of appeals' prior determination that Alenia's participation in such a conspiracy was irrelevant to the jurisdictional inquiry. Likewise, the court erroneously gave no weight to Texas's interest in regulating foreign entities that do substantial business in the forum and further failed to recognize that Alenia's burden of defending against litigation in the forum was correspondingly less than entities with no Texas presence at all. These errors followed from the court's refusal to give any weight to Alenia's in-state presence in its general jurisdiction analysis. As a consequence, if either of the court of appeals' minimum contacts determinations were reversed, the outcome likely would change because the forum interests the court ignored show that this is not one of the "rare" cases noted above, especially given the intentionally tortious nature of the underlying conduct. The court of appeals' fair play determination is thus not an independent basis supporting its judgment.

CONCLUSION

For the foregoing reasons and those previously presented, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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